No. 02-524-CFH

Entry	Date	Proceedings and Orders
		argument GRANTED.
	Apr 7 2003	Motion of Texas, et al. to consider out of time motion to participate in oral argument as amici curiae and for divided argument filed.
	Apr 14 2003	Reply brief of petitioner Kurt Jones, Warden filed.
	Apr 18 2003	Motion of Texas, et al. to consider out of time motion to participate in oral argument as amici curiae and for divided argument DENIED.
	Apr 21 2003	ARGUED.

Supreme Court, U.S.
FILED

No. _____ 02 524 OCT 2 - 2002

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In The
Supreme Court of the United States

KURT JONES,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

2. Whether Defendant Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

3. Whether this Court should grant *certiorari* to clarify the jurisprudence where there is a split of opinion within the United States Courts of Appeals and within the Sixth Circuit Court of Appeals and State Courts on the question of whether double jeopardy principles were violated in factually similar situations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

Now comes Kurt Jones, Petitioner, by Arthur A. Busch, Prosecuting Attorney in and for the County of Genesee, Michigan, by Donald A. Kuebler, Chief Appellate Counsel, and prays that a *writ of certiorari* will issue to review the judgment of the United States Court of Appeals, Sixth Circuit, filed June 6, 2002, mandate issued July 2, 2002, which affirmed the United States District Court's *vacatur* of Michigan defendant Duyonn Andre Vincent's conviction for first degree murder on double jeopardy grounds, with direction that the Michigan trial court sentence defendant for the offense of second degree murder.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Court of Appeals was filed February 16, 1996 and is reported as *People v Vincent*, 215 Mich App 458, 546 NW2d 662 (1996). That opinion vacated the defendant's conviction for first degree murder on Double Jeopardy grounds and remanded to the Genesee County Circuit Court for sentencing on the charge of second degree murder. Thereafter the people of Michigan obtained leave to appeal to the Michigan Supreme Court. On July 15, 1997 the Michigan Supreme Court reversed the Michigan Court of Appeals and ordered that defendant's first degree murder conviction be reinstated in *People v Vincent*, 455 Mich 110, 565 NW2d 629 (1997). Rehearing was denied at 456 Mich 1201. Defendant's petition for *certiorari* was denied by the United States Supreme Court November 10, 1997. Defendant filed

for *habeas corpus* relief under 28 U.S.C. sec. 2254 in the United States District Court for the Eastern District of Michigan which vacated his conviction for first degree murder on Double Jeopardy grounds. *Vincent v Jones*, 98-40007 (Nov. 7, 2000). Petitioner Jones appealed to the United States Court of Appeals, Sixth Circuit. On June 6, 2002 the Court of Appeals entered its opinion affirming the District Court below and on July 2, 2002, the Court issued its mandate. *Vincent v Jones*, 292 F3d 506 (CA 6 2002). [Copies of the opinions below and the referenced order of mandate are included in the appendix to this petition, *infra.*, App. 1a-83a]

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. s. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The constitutional provision involved in this petition is Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CONCISE STATEMENT OF THE CASE

A jury in Genesee County, Michigan convicted defendant Duyonn Andre Vincent of first degree murder, MCL 750.316 and felony firearm, MCL 750.227b. [Tr. Vol VII, p 70] Cofelon Dameon Perkins was convicted by the same jury of first degree murder and felony firearm. Cofelon Marcus Hopkins was convicted by a separate jury of involuntary manslaughter and felony firearm. [Tr. Vol. VII, p 70]

The Michigan Court of Appeals vacated defendant Vincent's first degree murder conviction and reduced it to second degree murder on double jeopardy grounds. *People v Vincent*, 215 Mich App 458 (1996); [App. 14a-25a] The Genesee County Prosecuting Attorney was granted leave to appeal to the Michigan Supreme Court and that Court reversed the Court of Appeals and ordered reinstatement of defendant's first degree murder conviction. *People v Vincent*, 455 Mich 110 (1997) [App. 26a-51a]

Defendant Vincent's petition for a *writ of certiorari* was denied by the United States Supreme Court on November 10, 1997 at 522 US 972, 139 L Ed 2d 325, 118 S Ct 424, 1997 LEXIS 6803.

On January 8, 1998 Petitioner Vincent filed for a writ of *habeas corpus* under 28 U.S.C. sec. 2254 in the US District Court for the Eastern District of Michigan. Defendant contended "the Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to

writing was insufficient to terminate jeopardy was contrary to, or an unreasonable application of, United States Supreme Court precedent." The case was referred to the magistrate judge who recommended granting the writ. The District Court, considering the matter *de novo* found that the statements of the trial court were sufficient to rise to the level of an acquittal of the first degree murder charge under United States Supreme Court precedent and that continuation of the trial constituted a violation of the double jeopardy clause of the Fifth Amendment. See Report and Recommendation of Magistrate, App. 52a-77a and Opinion and Order of Gadola, J., granting *habeas corpus*.

Petitioner Jones appealed the United States Court of Appeals, Sixth Circuit.

On June 6, 2002 the United States Court of Appeals, Sixth Circuit, affirmed the District Court and held as a matter of law, the statements of the trial judge constituted a directed verdict of acquittal such that jeopardy attached, and that the trial court could not reverse that decision later in the trial and permit the case to go to the jury for decision. The Court said it was irrelevant whether the trial judge informed the jury of his decision. The Court found that the trial judge had made a determination on the facts that there was insufficient evidence of first degree murder and that by later submitting the case to the jury on the charge of murder, the trial judge subjected the petitioner to prosecution for first degree murder in violation of the Double Jeopardy Clause. [App. 1a-12a] The Court of Appeals issued its Mandate on July 2, 2002. [App. 13a]

REASONS FOR GRANTING THE WRIT

The case *sub judice* presents this Honorable Court with the opportunity to resolve the question of whether the trial court's oral response to defendant's motion for directed verdict, which was never communicated to the jury, represented a resolution in defendant's favor, correct or not, of factual elements of the charged offense of first degree murder, thus barring further proceedings on the charge of first degree murder.

The United States Court of Appeals, Sixth Circuit, in the case *sub judice*, has decided federal questions and interpreted the Fifth Amendment in a way that is in conflict with decisions of other courts, state and federal, and within the Sixth Circuit, and this Court.

The opinion of the Sixth Circuit Court of Appeals is not supported by any recent decision of the United States Supreme Court. Moreover, recently decided cases of State Courts, other United States Courts of Appeals and within the Sixth Circuit, give substantial support to the contention of Petitioner that under the facts of this case Defendant Vincent's Fifth Amendment protection against double jeopardy was not violated.

ARGUMENT

1. The Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

Where a state court adjudicates a petitioner's constitutional claim on the merits, 28 U.S.C. sec. 2254 provides

the standard of review in a subsequent *habeas corpus* action. *Harpster v Ohio*, 182 F3d 322, 326 (6th Cir. 1997). The writ may issue only if the state court's consideration of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Sec. 2254(d)(1), or was based on an "unreasonable determination of the facts in light of the evidence presented." Sec. 2254(d)(2). In applying the "unreasonable application" clause, the Court must conclude that the "state court's application of clearly established federal law was objectively unreasonable." *Williams v Taylor*, 529 US 362, 120 S Ct 1495, 1521, 146 L Ed 2d 389, 428 (2000). The Court, on *habeas corpus*, "may not issue the writ simply because that Court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." Id., at 1522, 146 L Ed 2d at 429; *Nevers v Killinger*, 169 F3d 352 (6th Cir. 1999).

The Michigan Supreme Court found that Defendant Vincent's motion for directed verdict had not, in fact, been granted by the trial court. The Court thus did not reach the double jeopardy question. [App. 26a-42a]

The Court first noted that two panels of the Michigan Court of Appeals affirmed the convictions of defendant Vincent's cofelons and denied relief on double jeopardy claims in each case, finding that the trial court had not, in fact, directed a verdict of acquittal on the first degree murder charge. 455 Mich 110, 115-117. Only the Michigan Court of Appeals panel considering defendant Vincent's appeal had reached the conclusion that an order had been granted. [App. 14a-25a]

The Michigan Supreme Court acknowledged that a directed verdict is an acquittal for purposes of the double jeopardy clause, and that its determination of whether the trial court's statements constitute a dispositive order was crucial to the claim. The Court said that under *People v Hampton,* 407 Mich 354 (1979), the trial court considering a motion for directed verdict must evaluate the evidence and determine the legal sufficiency thereof in the light most favorable to the prosecution. The Court said that a retrial is not allowed if the Court evaluated the evidence but did not find it to be insufficient, citing *People v Mehall*, 454 Mich 1, 6 (1997). The record fact that the trial judge in this case had not done so was a factor in the Michigan Supreme Court's conclusions:

> "We are not convinced that the standards articulated in *Hampton* and *Mehall* were met in this trial judge's statement of his impressions, nor are we convinced that the judge's statement rose to the requisite level of certainty and finality to constitute a directed verdict. There was no indication in the record that the judge evaluated all the evidence in the light most favorable to the prosecution. *Mehall* at 6. There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the Court considered or rejected because there was no mention of them reflected in the express remarks of the Court. There was also no explicit reference to legal insufficiency. Further, although the judge mentioned that he was considering all the factors, there was no indication which factors he had actually considered or rejected.
>
> Accordingly we hold this general inconclusive statement to be no more than a judge thinking out loud. The foundation laid to support this

> conclusory impression was inadequate. When ruling on the sufficiency of the evidence, a Court must generally give a more particularized detailed analysis on the record of the evidence and reasoning that forms the basis for the decision and a clear statement that the motion is either granted or denied." [App. 37a-38a]

The Court also noted the well accepted rule that Courts speak through their judgments and decrees and not by what is stated in open Court. That is, "a judgment or order is reduced to written form, . . . until reduced to writing and signed, the judgment did not become effective . . . . " Id., at 122, 123. [App. 38a]

The Michigan Supreme Court then noted the similarities between the case *sub judice* and decisions from other jurisdictions such as *State v Collins*, 112 Wash 2d 303, 771 P2d 350 (1989); *People v Jackson*, 647 NYS2d 764 (1966); *State v Newfield*, 788 P2d 1366 (Ariz. App. 1989) where those Courts in similar circumstances found that the defendants' double jeopardy rights had not been violated, citing *United States v Bruno*, 873 F2d 555, 562 (CA 2 1989). The Michigan Supreme Court found that a decision to submit the case to the jury implicitly denies the motion for directed verdict. [App. 39a, 41a]

In the District Court, Gadola, J., Petitioner Jones argued that the Michigan Supreme Court's conclusion that the trial court had not rendered a final judgment on the defendant's motion for directed verdict was a factual conclusion entitled to the presumption of correctness under 28 U.S.C. sec. 2254(e)(2).

The Court of Appeals in the case *sub judice* rejected the argument and agreed with the District Court that whether the state trial judge acquitted the petitioner of

first-degree murder is a question of law and not one of fact. [App. 9a] But the Court then goes on to review the language of the Michigan trial judge and concluded that his statement was not ambiguous and that his later comments reflected his belief that he had granted a motion for directed verdict. The Court also cites to a docket entry which makes reference to the motions for directed verdict and the entry stating "Court amended Ct: 1 Open murder to 2nd Degree Murder." [App. 11a] The Court concluded "Thus, the trial judge made a determination on the facts that there was insufficient evidence of first-degree murder. By later submitting the case to the jury on the open murder charge, the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause. [App. 12a]

2. Defendant Vincent was not placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

Petitioner Jones submits that the Court of Appeals decision herein is contrary to the prevailing jurisprudence. The question of whether there is an acquittal depends largely on state law. *Michigan v Long*, 463 US 1032, 103 S Ct 3469, 77 L Ed 2d 1201 (1983); *Schiro v Clark*, 754 F Supp 646, 660 (N.D. Ind. 1990). In *US v Lanzotti*, 90 F3d 1217 (7th Cir. 1996), the Court said an "acquittal" in the context of double jeopardy means a "resolution, correct or not, of some or all of the factual elements of the offense charged." [citing *Burks v US*, 437 US 1, 10, 98 S Ct at 2147] Thus, for a ruling to be considered a functional

acquittal, it must speak to the factual innocence of the defendant. 437 US 1, 15, 98 S Ct at 2149; *Scott*, 437 US at 97, 98 . . . " See also *US v Kennings*, 861 F2d 381 (CA 3 1988).

In *US v Branch*, 91 F3d 699 (CA 5 1996), the Court of Appeals held that the district judge's comments at a bench conference expressing his misapprehension regarding the validity of inconsistent jury verdicts did not reflect any doubt regarding the sufficiency of the evidence and, thus, the double jeopardy clause did not bar reinstatement of the verdict. See also *US v Affinito*, 873 F2d 1261 (CA 9 1989) where the prosecutor appealed from an order of the district court granting a motion for a judgment of acquittal in a mail fraud case. The Court of Appeals held that the lower court's order granting acquittal was erroneous and that the trial court never stated that the evidence was insufficient to demonstrate a deprivation of money or property rights. The Court observed that the trial court's *ore tenus* ruling evidenced ambivalence about the best way to rectify the defective indictment and jury instructions.

Other state courts have held that even where there has been an order directing a verdict of acquittal, the order may be set aside where the jury has not been discharged. See 75 Am Jur 2d, Trial, sec. 1042, citing *Campbell v Schoering*, 735 SW2d 145 (1988). See also *State v Iovino*, 524 A2d 557, 558, 559 (RI 1987) where the court, citing *Martin Linen Supply Co.* said " . . . the distinction . . . lies in the facts that the reconsideration in this case had no effect on the continuance of the trial in which it was made, that the jury remained impaneled to adjudicate lesser included charges, and that defendant was not faced with any threat of reprosecution beyond the jury already

assembled to hear his case." See also *State v Sperry*, 945 P2d 546 (Ore. App. 1997).

3. This Court should grant *certiorari* to clarify the jurisprudence where there is a split of opinion within the United States Courts of Appeals and a split of opinion within the Sixth Circuit and State Courts on the question of whether double jeopardy principles were violated in factually similar circumstances.

The Court of Appeals in the case *sub judice* failed to refer to or acknowledge the existence of Sixth Circuit jurisprudence on the issue at hand. That is, the Court did not cite or discuss the recent decision in *US v Baggett*, 251 F3d 1087 (CA 6 2001), *rehrg. denied* July 31, 2001, 2001 U.S. App LEXIS 19012, *cert. denied* Feb. 25, 2002 reported at 2002 LEXIS 1269. There the Court said that whether the government may appeal a judgment of acquittal entered by the district court under Fed. R. Crim. P. 29 depends on the timing of the Court's decision. The Court said the central question is whether the district court granted the defendant's motion for judgment of acquittal prior to the jury's verdict, in which case double jeopardy would deprive the Court of Appeals of jurisdiction under 18 U.S.C. sec. 3731, or whether it reserved decision on the motion until after the jury's verdict in which case double jeopardy did not prevent review. The Court found that ambiguity in the record of the proceedings rendered the question difficult to answer, but found that several factors suggested that the trial court intended to reserve decision on defendant's motion until after the jury returned a verdict. Judge R. Guy Cole, Jr., of the Sixth Circuit summarized the proceedings involved as follows:

> First, the District Court stated, "I will grant the government's request to allow it to go to the jury – and to hold the Court's ruling in abeyance until after that." This statement immediately followed a discussion between counsel and the court regarding the government's concern that it would be prohibited from appealing if the court granted the motion before submitting the case to the jury. It appears, therefore, that the government's desire to preserve its ability to appeal was the direct cause of the court's decision to "hold its ruling in abeyance." [251 F3d at 1094]

While the written order granting the defendant's motion was filed in the clerk's office and entered on the docket on September 9, 1999, the jury's verdict was returned in open court and entered on the docket on September 8, 1999. The Court also found that it was significant that the Court entertained closing arguments by counsel, instructed the jury on the applicable law, and allowed the jury to deliberate and return a verdict. The Court found that such a course of action would have been entirely unnecessary if the Court had rendered an effective judgment of acquittal at the close of all the evidence. Notwithstanding the district court's confused handling of the Defendant's Rule 29 Motion, the Court was persuaded that the district court reserved its decision until after the jury returned its verdict. The Court found that both the Second and Ninth Circuits have held that double jeopardy principles were not violated in factually similar situations, citing *US v Byrne*, 203 F3d 671 (9th Cir. 2000) and *US v LoRusso*, 695 F3d 45 (2d Cir. 1982). The Court concluded that both *Bryne* and *LoRusso* stand for the proposition that an oral grant of a Rule 29 Motion outside the jury's presence does not terminate jeopardy, inasmuch as a Court is free to change its mind prior to the entry of a

judgment. As in *Bryne* and *LoRusso*, the jury in *Baggett* was not present or informed of the Judge's oral ruling on the Defendant's motion for acquittal. The jury deliberated and returned a guilty verdict. The *Baggett* Court said "This fact more than any other supports our conclusion that the double jeopardy clause does not bar the government's appeal. Because reversal of the district court's judgment on appeal does not require the government to retry defendant, but rather requires only reinstatement of the jury's guilty verdict, the double jeopardy clause is not offended." [Citation omitted] [251 F3d at 1095]]

Petitioner Jones submits that a similar ruling should have entered in the case *sub judice*, as in *State v Iovino*, 524 A2d 557 (R.I. 1987), *supra*, where the Court citing *Martin Linen Supply Co.* held in pertinent part that the double jeopardy clause does not prohibit a conviction where the defendant is not faced with any threat of reprosecution beyond the jury already impaneled to hear his case. [524 A2d at 558, 559]. Cf., also App. 23a, fn. 4 where the Michigan Supreme Court cites and discusses the *Iovino* decision. See also *State v Sperry*, 945 P2d 546 (Ore. App. 1997). Such was the situation in the case at bar where Defendant Vincent's jury was not informed of proceedings involving the Motion for directed verdict and proceeded to decision on the charge of first degree murder following defendant's presentation of evidence, closing arguments of the prosecuting attorney and defense counsel, and jury instructions.

Where the case involves important legal questions and the Courts of Appeals have previously rendered contrary results, this Court has granted *certiorari* to resolve the conflict. See e.g., *United States v Muniz*, 374 US 150, 83 S Ct 1050, 10 L Ed 2d 805 (1963).

Petitioner Jones submits that on the record in this case and the jurisprudence, *certiorari* should be granted, and the Sixth Circuit Court of Appeals decision should be reversed and Defendant Vincent's conviction for first degree murder reinstated.

Date: October 1, 2002

Respectfully Submitted,

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Appendix for Petitioner

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DUYONN ANDRE VINCENT, Petitioner-Appellee,
v. KURT JONES, Respondent-Appellant.

No. 00-2441

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

April 30, 2002, Argued
June 6, 2002, Decided
June 6, 2002, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Michigan at Flint. No. 98-40007. Paul V. Gadola, District Judge.

DISPOSITION: Affirmed.

COUNSEL: ARGUED: Janet A. Van Cleve, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellant.

David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

ON BRIEF: Janet A. Van Cleve, OFFICE OF THE ATTORNEY GENERAL, HABEAS CORPUS DIVISION, Lansing, Michigan, for Appellant.

David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

JUDGES: Before: SUHRHEINRICH and GILMAN, Circuit Judges; HOOD, District Judge.*

OPINION BY: JOSEPH M. HOOD

OPINION:

JOSEPH M. HOOD, District Judge. This is an appeal from a decision granting a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted by a jury of first-degree murder. At the close of the prosecution's case, Petitioner moved for a directed verdict on the first-degree murder charge. At issue is whether the state trial judge granted a directed verdict at that time such that the continuation of the trial and submission of the first-degree murder charge to the jury constituted double jeopardy. Inasmuch as the state trial judge's comments, coupled with the state court's docket entry, amounted to an acquittal on the first-degree murder charge, the district court's decision granting the writ of habeas corpus is **AFFIRMED**.

FACTUAL BACKGROUND

Petitioner and two co-defendants were charged with open murder and possession of a weapon in the commission of a felony. The charges arose from a shooting death that occurred during a confrontation between two groups of youths at a high school in Flint, Michigan. The three defendants were tried before two separate juries during

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

one trial. At the close of the prosecution's case in chief, and outside the hearing of the jury, counsel for all three defendants moved for directed verdicts of acquittal on the charges of first-degree murder, on the grounds that there was insufficient evidence of premeditation and deliberation. After all parties had presented their arguments, the trial judge said:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

See J.A. 220, Trial Colloquy (3/31/92). The trial judge then discussed several unrelated matters with the attorneys. Finally, prior to adjourning for the day, the prosecutor requested to make a brief restatement regarding first-degree murder the following morning. The trial judge agreed to hear him.

The next day, April 1, 1992, the court allowed the prosecutor to make a presentation regarding the propriety of directing a verdict on the first-degree murder charges. Defense counsel for the petitioner objected on the basis that the Court had granted the motion for directed verdict the day before and that jeopardy had attached at that time. The trial judge responded:

> Do you really believe that? You think that when a decision is made that before it's recited the parties who are directly involved in it and particularly the jury we're asking now for the jury not to consider certain factors that might be brought to them, that a Court cannot consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.

See J.A. 195, Trial Colloquy (4/1/92). When counsel for one of the co-defendants joined in objecting on double jeopardy grounds, the following exchange took place:

> THE COURT: You think double jeopardy has anything to do with this?
>
> MS. CUMMINGS: Yes. I believe once you've directed. A verdict –
>
> THE COURT: Why is that?
>
> MS. CUMMINGS: A verdict that that's . . .
>
> THE COURT: I haven't directed a verdict to anybody.
>
> MS. CUMMINGS: You granted our motion.

> THE COURT: Oh, I granted a motion but I have not directed a verdict.

See J.A. 197-8, Trial Colloquy (4/1/92). After hearing all the parties, the trial court decided to take the motion under advisement, stating:

> Well, I'm going to consider the argument that Counsel has made. And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Courts ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve a ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it. Now I'm basing, of course, the decision upon what we have up until such a time as the motion's being made. But I'll reserve the ruling.

See J.A. 205, Trial Colloquy (4/1/92). The trial resumed and Petitioner and other witness testified. The next morning, April 2, 1992, the trial judge stated:

> I've reconsidered the ruling that the Court earlier made and I've decided to let the jury make its own determination on the Degrees. That's where we'll stand now so we'll let them have all those issues submitted to them, First, Second, Manslaughter and you can go on from there.

See J.A. 207-8, Trial Colloquy (4/2/92). The jury subsequently convicted the petitioner of first-degree murder. His co-defendants were convicted of second-degree murder and involuntary manslaughter.

All three defendants appealed their judgments, at least in part, on double jeopardy grounds. Separate

Michigan Court of Appeals panels considered each appeal. The two panels which heard Petitioner's co-defendants' appeals determined that there was no double jeopardy violation because the trial judge had not ordered a directed verdict. The panel hearing Petitioner's appeal determined that the trial judge had ordered a directed verdict and could not constitutionally reverse a grant of directed verdict later in the trial. The panel reversed Petitioner's first-degree murder conviction on double jeopardy grounds and ordered entry of a conviction of second-degree murder and re-sentencing. *Michigan v. Vincent,* 546 N.W.2d 662 (Mich. Ct. App. 1996). Petitioner's case was appealed to the Michigan Supreme Court, which reversed the Court of Appeals in a 4 to 3 decision, finding that the trial judge had not ordered a directed verdict. *Michigan v. Vincent,* 565 N.W.2d 629 (Mich. 1997). Petitioner filed a motion to reconsider, pointing out a docket entry which indicated that the trial judge had granted the motion for directed verdict.[1] The Michigan Supreme Court denied the motion without comment. Petitioner's petition for a writ of certiorari was denied by the United States Supreme Court on November 10, 1997.

On January 8, 1998, Petitioner filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, arguing that "the Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to writing was insufficient to terminate jeopardy was contrary to, or an unreasonable application of, United

[1] This docket entry was not discovered until after the Michigan Supreme Court had rendered its decision.

States Supreme Court precedent." Petitioner's Brief at 13. The district court referred the matter to a magistrate judge who subsequently recommended granting the writ. After considering the matter *de novo* in light of the respondent's objections, the district court found that the statements of the trial judge were sufficient to rise to the level of an acquittal of the first-degree murder charge under United States Supreme Court precedent, such that the continuation of the trial constituted a violation of the Double Jeopardy Clause of the Fifth Amendment. The petition for a writ of habeas corpus was granted, and this appeal timely followed.

STANDARD OF REVIEW

A district court's legal conclusions in a habeas proceeding are reviewed *de novo* and its factual findings are reviewed for clear error. *House v. Bell,* 283 F.3d 737 (6th Cir. 2002). Under 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under this provision, a writ may issue if the state court applied a legal rule that contradicts United States Supreme Court precedent, or if the state court applied the correct legal rule but its application of the rule to the facts of the case was objectively unreasonable. *Williams v. Taylor,* 529 U.S. 362, 405-13, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).

DISCUSSION

Respondent argues that the district court's decision that the trial judge violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution was erroneous on two alternate grounds. Initially, Respondent argues that the Michigan Supreme Court's determination that the trial judge's statements were not a directed verdict is entitled to deference. Alternatively, Respondent argues that the state trial judge could reconsider his grant of the motion for directed verdict shortly thereafter without violating the Double Jeopardy Clause.

Respondent initially contends that the state trial judge did not order a directed verdict by his statements on March 31, 1992. His position is that the Michigan Supreme Court's determination that the statements were not a directed verdict was a factual determination that is entitled to deference under 28 U.S.C. § 2254(e).[2] The

[2] In pertinent part, 28 U.S.C. § 2254 provides:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The

(Continued on following page)

district court took the position that the Michigan Supreme Court's determination was not a factual finding by holding that the state trial judge's statements were not in dispute; rather, it was the legal significance of those statements that was in dispute.

Once a defendant has been acquitted of a crime, the Double Jeopardy Clause prohibits any further prosecution of the defendant for that crime. *See* U.S. Const. amend. V.; *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977). "Whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania,* 476 U.S. 140, 145, 90 L. Ed. 2d 116, 106 S. Ct. 1745 (1986). In *Martin Linen* the Supreme Court stated that:

> We have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

430 U.S. at 571 (citations omitted). *See also Smalis,* 476 U.S. at 144.

We agree with the district court that whether the state trial judge acquitted the petitioner of first-degree murder is a question of law and not one of fact. In this

applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

case, the statements of the trial judge are not in question. Rather it is the legal significance of these statements that is the focus of our inquiry. Accordingly, we are not bound by the holding of the Michigan Supreme Court that the trial judge's statements did not constitute a directed verdict under Michigan law. Instead, we must examine the state trial judge's comments to determine whether he made a ruling which resolved the factual elements of the first-degree murder charge. Such a conclusion is supported by the United States Supreme Court's decision in *Smalis,* where, in considering whether the grant of a demurrer constitutes an acquittal for the purposes of double jeopardy, Justice White, speaking for a unanimous court, wrote:

> We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as the trial judge's characterization of his own action cannot control the classification of the action under the Double Jeopardy Clause, so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

Smalis, 476 U.S. at 144 fn5 (citations omitted).

A review of the trial transcript reveals that the trial judge initially granted the motion for directed verdict through his statements at the end of the day March 31, 1992. He then allowed the government to reargue the issue the next morning and took the matter under advisement. The following morning, two days after granting the motion, he reversed his decision.

Our conclusion that the trial judge granted the motion is warranted by the precise language he used. At the end

of the day, after hearing oral arguments, the trial judge concluded:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

See J.A. 220. There was no ambiguity in this statement. Furthermore, the trial judge's later comments clearly reflect his belief that he had previously granted the motion for a directed verdict. *See* J.A. 198 ("Oh, I granted a motion but I have not directed a verdict."); J.A. 205 ("And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Courts [sic] ruling earlier."); J.A. 207 ("I've reconsidered the ruling that the Court made . . . "). Additional support is found in the docket sheet which contained the following entry for March 31, 1992:

MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: 1 OPEN MURDER TO 2ND DEGREE MURDER.

See J.A. 87.

We now address whether the above statements and actions constituted a resolution of some or all of the factual elements of the offense charged such that jeopardy attached. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 51 L. Ed. 2d 642, 97 S. Ct. 1349 (1977). We find that when the trial judge granted the motion for directed verdict on March 31, 1992, his actions constituted a grant of an acquittal on the first-degree murder charge such that jeopardy attached. We further find that he was not entitled to reverse that decision later in the trial. It is irrelevant whether the trial judge had informed the jury of his decision. After hearing oral arguments on the issue by both parties, the trial judge concluded that the government had not proved premeditation or planning in the slaying, a required element for first-degree murder. *See* J.A. 220. Thus, the trial judge made a determination on the facts that there was insufficient evidence of first-degree murder. By later submitting the case to the jury on the open murder charge, the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause.

CONCLUSION

For the forgoing reasons, we **AFFIRM** the district court's decision granting habeas corpus relief pursuant to 28 U.S.C. § 2254.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 00-2441

Filed: July 2, 2002

DUYONN ANDRE VINCENT

Petitioner-Appellee

v.

KURT JONES

Respondents-Appellant

MANDATE

Pursuant to the court's disposition that was filed 6/6/02 the mandate for this case hereby issues today.

A True Copy.

COSTS: **NONE**

Filing Fee .....$
Printing .....$

Total .....$

Attest:

/s/ [Illegible]
Deputy Clerk

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215 MICH APP 458

Michigan Court of Appeals

People

v.

Duyonn Andre Vincent

Docket No. 157220. Submitted January 17, 1996, at Detroit. Decided February 16, 1996, at 9:00 A.M. Leave to appeal sought.

State Appellate Defender (by *Randy E. Davidson*), for the defendant on appeal.

Before: TAYLOR, P.J., and JANSEN and SMOLENSKI, JJ.

TAYLOR, P.J. Defendant appeals as of right from a jury conviction of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We reverse.

Defendant and two others were jointly tried as a result of a fatal shooting. Defendant, Marcus Hopkins, and Dameon Perkins, were all charged with open murder and felony-firearm. The charges were considered by two juries. The case against Perkins was considered by one jury, and a second jury considered the case against defendant and Hopkins. Perkins' jury convicted him of second-degree murder and felony-firearm. Defendant's and Hopkins' jury convicted Hopkins of involuntary manslaughter and felony-firearm. This same jury convicted defendant of first-degree murder and felony-firearm. Hopkins' and Perkins' convictions were affirmed on appeal in separate unpublished opinions. *People v. Hopkins*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 1995 (Docket No. 158133); *People v. Perkins*, unpublished

opinion per curiam of the Court of Appeals, issued November 21, 1995 (Docket No. 160177).

Defendant argues on appeal that his conviction of first-degree murder violated his constitutional right not to be placed twice in jeopardy, US Const, Am V; Const 1963, art 1, § 15. We agree.

At the close of the prosecutor's case, defense counsel moved for a directed verdict of acquittal with respect to the charge of first-degree murder and asked the court to permit the jury to consider only the crime of second-degree murder. Similar motions were made by the codefendants. The prosecutor opposed the motions, arguing that the evidence was sufficient to establish first-degree murder when viewed in a light most favorable to the prosecution. The court then stated as follows:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is second-degree murder. . . . I think that second-degree murder is an appropriate charge as to the defendants.

The parties then discussed several housekeeping matters, including whether the different juries would be present during presentation of defendant's defense, how long witnesses were expected to testify, and the logistics of moving the juries and witnesses in and out of the courtroom. After the three defendants left the courtroom, the prosecutor asked if he could make a brief "restatement" in terms of the first-degree murder charge when the juries came back the next morning because he wanted to find some law relating to the matter at issue. The court said it would be glad to hear the prosecutor. The next morning

the prosecutor argued that, on the basis of the evidence and the law, the jury should determine if first-degree murder had been established. At the conclusion of the prosecutor's arguments, defense counsel argued that the court had granted a directed verdict with regard to the first-degree murder charge the previous day and cited the constitutional prohibition against placing a defendant in double jeopardy. The court advised defense counsel that it had not informed the jury "of any of these things." Defense counsel reiterated his contention that a decision had been made the previous day. The court said that it did not believe a court is precluded from reconsidering a decision already made if that decision has not been recited to the parties, particularly the jury. When counsel for Hopkins cited the Double Jeopardy Clause, the court said that it had not directed a verdict for anybody. Counsel for Hopkins then told the court that it had granted his motion. The court then stated: "Oh, I granted a motion but I have not directed a verdict." The prosecutor proceeded to present further argument in support of his position. The court then stated that it was going to consider the argument counsel had made and that no harm had come about by the "court's ruling earlier" because the jury had not been informed of "the conclusion this court drew" after arguments of counsel. The court then said that it was going to reserve ruling. Following that ruling, the defense presented its case, in which defendant called one witness and also testified in his own behalf. After all defendants had rested, the court said:

> I've reconsidered the ruling that the court earlier made and I've decided to let the jury make its own determination on the degrees.

Thereafter, the court submitted the first-degree murder charge against defendant to the jury, and he was found guilty of first-degree murder. After the jury returned its verdict, defense counsel renewed his motion for a directed verdict, which the court denied.

The propriety of the trial court's reconsidering its ruling that premeditation had not been shown, and allowing the jury to consider first-degree murder, has previously been considered by the panels of this Court that affirmed the convictions of codefendants Hopkins and Perkins. The *Hopkins* and *Perkins* panels, in unpublished opinions, held that Hopkins' and Perkins' double jeopardy rights had not been violated. Because these opinions were not published, they are not binding on this panel. Administrative Order No. 1994-4 provides only that a panel of this Court must follow the rule of law established in a prior Court of Appeals' *published* decision issued on or after November 1, 1990, unless reversed or modified by the Supreme Court or a special panel of this Court. Further, MCR 7.215(C) provides that an unpublished opinion is not precedentially binding under the rule of stare decisis. While we believe that inconsistent results on appeal involving codefendants are undesirable, *People v. Hayden,* 132 Mich App 273; 288-289, n 8; 348 NW2d 672 (1984), we are persuaded that defendant's constitutional right not to be placed twice in jeopardy was violated and, therefore, are compelled to reverse his first-degree murder conviction.

The prosecutor has not filed a brief on appeal to contest defendant's claim that his double jeopardy rights were violated. We can only assume that the prosecutor believes this Court will follow the analysis of the *Hopkins* and *Perkins* panels and find no double jeopardy violation. The *Perkins* panel found no double jeopardy violation,

even though the trial court had indicated the proofs supported only second-degree murder, stating:

> Since the trial court had never indicated to the jury that it was directing a verdict of acquittal on first-degree murder, there was no prejudice to defendant and, more importantly, defendant's double jeopardy rights were not violated.

This conclusion of the *Perkins* panel is not supported by any authority.

The *Hopkins* panel resolved the double jeopardy issue as follows:

> While the court expressed an opinion that ultimately would have ripened into a final ruling had nothing intervened and the court taken the issue from the jury, the court, before acting on its expressed opinion, agreed to hear further argument from the prosecutor regarding the issue. When the court recessed for the day, everyone was aware that the prosecutor was going to present further argument on the issue of first-degree murder the next morning, before defendants would proceed with their cases. The matter was addressed the next morning, and the court reconsidered its opinion earlier expressed, concluding that it would reserve ruling.
>
> Thus, the record indicates that the court expressed an opinion, and then before finalizing that opinion, agreed to entertain further argument. The court did not make a final ruling until it denied defendant's motion for directed verdict and submitted the case to the jury. We conclude the court was not barred from further consideration of the matter.

This conclusion in *Hopkins* is also not supported by any authority.

In *Smalis v. Pennsylvania,* 476 US 140; 106 S Ct 1745; 90 L Ed 2d 116 (1986), the Supreme Court reiterated that a trial court's determination that the evidence is insufficient to convict is an acquittal under the Double Jeopardy Clause and that the Double Jeopardy Clause bars subjecting a defendant to post-acquittal fact-finding proceedings going to the guilt or innocence regarding such a charge. As explained below, we are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights.

This Court's research has located several cases with facts similar to those in the case at bar that support our finding that defendant's double jeopardy rights were violated.

In *Brooks v. Maryland,* 299 Md 146; 472 A2d 981 (1984), the Maryland Court of Appeals considered a case where the trial court granted a motion for a directed verdict and "shortly thereafter" the prosecutor asked the court to reconsider its ruling. After hearing further argument from the prosecutor, the trial court reversed the grant of a directed verdict and denied the motion. The appellate court reversed the defendant's jury conviction on double jeopardy grounds, stating:

> He [the judge] was belatedly persuaded in the light of the prosecution's tardy argument that the issue was for the jury. . . . [B]oth the State's

> argument and the judge's new ruling came too late. Once a trial judge intentionally acquits a defendant of a criminal offense over which the court has jurisdiction, the prohibition against double jeopardy does not permit him to change his mind. The grant of the motion for judgment of acquittal was a bar to further criminal proceedings on the same charge. [*Id.*, p 155.]

In *Lowe v. Kansas,* 242 Kan 64; 744 P2d 856 (1987), the Kansas Supreme Court considered a case where the trial court, outside the jury's presence, dismissed a charge on the basis of insufficient evidence after the state had rested its case. The following morning, the trial court reversed its earlier ruling and reinstated the charge. The appellate court reversed the defendant's jury conviction, citing *Smalis,* and stating:

> The reinstatement of the theft charge the next day and its submission to the jury constituted "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged" which, under *Smalis,* constituted a violation of the prohibition against double jeopardy. [*Id.*, p 67.]

In *People v. Lerner,* 128 AD2d 641; 512 NYS2d 886 (1987), the New York Supreme Court, Appellate Division, considered a case where the trial court granted a motion for a directed verdict of a kidnapping count. At the start of the trial the following day, the prosecutor moved to reargue the motion. The trial court allowed the prosecutor to reargue the motion and then reserved decision on the defendant's motion. The appellate court reversed the defendant's jury conviction, stating:

> The trial order of dismissal granted at the conclusion of the People's case or at the conclusion of all of the evidence is "tantamount to an acquittal" (*People v. Zagarino,* 74 AD2d 115, 120; 427 NYS2d 40), and to allow reargument of such an order and the submission of a count previously dismissed pursuant thereto to a jury, would clearly violate the constitutional prohibition against double jeopardy. [*Id.*, p 644.]

In *People v. Strong,* 129 Ill App 3d 427; 472 NE2d 1152 (1984), the Illinois Court of Appeals considered a case where the trial court granted a motion for a directed verdict at the close of the state's case. The following day the prosecutor asked the trial court to reconsider its decision, at which time the court rescinded its previous decision and submitted the matter to the jury. The appellate court reversed the defendant's jury conviction, stating:

> Although as the State argues, and we confirm, the court erred in directing the verdict of acquittal on the home invasion charge, it is well settled that the legal effect of the directed verdict was to bar, under double jeopardy principles, the vacation or reversal of that verdict. Unquestionably, the allowance of defendants' motion for a directed verdict on the home invasion charge at the close of the State's case constituted a final adjudication on the merits of that charge. A trial court, therefore, may not withdraw an order directing a verdict and permit the jury to make a finding on the charge. [*Id.*, pp 430-431 (citations omitted).]

In *Arizona v. Millanes,* 180 Ariz App 418; 885 P2d 106 (1994), the trial court granted a motion for acquittal. The prosecutor twice sought to have the court reconsider the acquittal. After a recess, the court reversed its earlier

ruling. The Arizona Court of Appeals reversed the defendant's jury conviction, citing *Smalis,* and the Kansas Supreme Court's decision in *Lowe,* on the basis that the trial court's reversal of its earlier grant of an acquittal violated the defendant's right not to be placed twice in jeopardy.

The fact that the trial court in the case at bar did not inform the jury that it had directed a verdict of not guilty with regard to the first-degree murder charge did not prevent its ruling from taking effect. *Lowe, supra.* Indeed, in *Lowe,* the Kansas Supreme Court, on the basis of *Smalis,* overruled its prior decision in the *Lowe* case that had cited a lack of prejudice to the defendant in that no intervening proceedings had taken place before the jury when the trial court reversed its earlier grant of an acquittal.

The trial court communicated its decision directing a verdict of acquittal with respect to the first-degree murder charge to the prosecutor, all three defense counsel, and all three defendants. This made the court's ruling binding.

We reject any suggestion that the trial court did not actually direct a verdict of acquittal with respect to the first-degree murder charge after hearing the arguments of counsel. While the court's words, "Well, my impression at this time," may be somewhat ambiguous, the court's following statement, "What we have at the very best is second-degree murder," is not ambiguous. The next morning, the court acknowledged he had granted the motions for a directed verdict. In deciding to reserve ruling, the court referred to the "ruling" it had made earlier, and in submitting the first-degree murder charge to the jury, the

court said it had reconsidered the "ruling" it had previously made.

The trial court's characterization of its actions is not controlling, *People v. Anderson,* 409 Mich 474, 486; 295 NW2d 482 (1980), but it does support our conclusion that the court directed a verdict of acquittal with respect to the first-degree murder charge. The trial court's claim that it had not directed a verdict (apparently on the basis that it had not informed the jury of its decision), even though it had granted motions for a directed verdict, was contradictory and was based on an irrelevant consideration. The trial court's ruling was not inadvertent or a slip of the tongue, see *Pugh v. Maryland,* 271 Md 701; 319 A2d 542 (1974), but was a decision made after hearing arguments from four attorneys. Nor was there merely a continuing discussion on the record, see *Arizona v. Newfield,* 161 Ariz App 470; 778 P2d 1366 (1989), or mere ruminating by the court. The court made a ruling that it later reconsidered. However, once the court rendered its ruling on the record directing a verdict of acquittal with respect to the first-degree murder charge, double jeopardy principles forbade it from changing its mind and allowing the jury to consider a first-degree murder charge. The court's reversal of its directed verdict resulted in further proceedings in which the jury resolved factual issues concerning the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge. *Smalis, supra.*

We also find that MCR 2.604(A) is inapplicable. This court rule states that an order or decision adjudicating fewer than all claims is subject to revision before entry of final judgment adjudicating all the claims. We believe MCR 2.604(A) applies only to civil actions and is therefore

inapplicable. MCR 6.001(D)(2). Assuming, arguendo, that MCR 2.604(A) does apply to criminal cases, we find that it would, in the case at bar, be unconstitutional. A trial court's determination of insufficient evidence producing a directed verdict of acquittal terminates jeopardy with respect to that particular charge. *Vanderbilt v. Collins,* 994 F2d 189, 195 (CA 5, 1993). Once jeopardy has terminated regarding a particular charge, double jeopardy protections forbid further proceedings, such as jury deliberations, relating to that charge. *Smalis, supra; Lowe, supra.*

We further note that the trial court violated MCR 6.419(A). This court rule states:

> Before Submission to Jury. After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, *the court* on its own initiative may, or *on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion.* If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations. [Emphasis added.]

After initially granting defendant's motion, the trial court decided to reserve ruling. However, the court rule quite clearly forbade the court from reserving its decision with respect to defendant's motion. The trial court's subsequent denial of defendant's motion after defendant had testified was a violation of the court rule. At the time defendant gave his testimony, he did not know if he faced a charge of first-degree murder or second-degree murder. However, pursuant to MCR 6.419(A), defendant was

entitled to know the most serious charge he faced before he testified on his own behalf.

Defendant's claim that the trial court erred when it ultimately denied his motion for a directed verdict of acquittal with respect to the first-degree murder charge is moot, given this Court's resolution of the double jeopardy issue.

We also reject defendant's claim that he is entitled to a new trial or to an order remanding the matter to the trial court so he can move for a new trial based upon an affidavit he submitted. MCR 2.611(A)(1)(f); *People v. Bradshaw,* 165 Mich App 562, 567; 419 NW2d 33 (1988).

We are satisfied that the appropriate remedy is to remand for entry of a conviction of second-degree murder and resentencing. If defendant had been convicted of second-degree murder, when the jury was improperly allowed to consider a first-degree murder charge, he would be entitled to a new trial on a second-degree murder charge because of the possibility of jury compromise. *People v. Vail,* 393 Mich 460, 463-464; 227 NW2d 535 (1975). However, in the case at bar, there was no compromise verdict because defendant was convicted of the most serious charge and the evidence established that defendant was guilty of second-degree murder. Under such circumstances, entry of a conviction of second-degree murder is the appropriate remedy. *People v. Hoffmeister,* 394 Mich 155, 161-162; 229 NW2d 305 (1975).

Reversed and remanded for entry of a conviction of second-degree murder and for resentencing.

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455 MICH 110

Michigan Supreme Court

People

v.

Duyonn Andre Vincent

Docket No. 105808. Argued April 10, 1997 (Calendar No. 12). Decided July 15, 1997. Rehearing denied 456 Mich 1201.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Arthur A. Busch*, Prosecuting Attorney, and *Donald A. Kuebler*, Chief, Research, Training and Appeals, for the people.

State Appellate Defender (by *Randy E. Davidson*) for the defendant.

Amici Curiae:

Ronald J. Bretz and *Patrick Levine Rose* for Criminal Defense Attorneys of Michigan.

Michael Thomas, President, *John D. O'Hair*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief, Research, Training and Appeals, for Prosecuting Attorneys Association of Michigan.

MALLETT, C.J. We granted leave in this case to determine whether the Court of Appeals properly characterized a particular statement made by a trial judge as a directed verdict of acquittal. We reverse the judgment of the Court of Appeals and hold that the judge's inchoate observations did not ripen into a directed verdict of acquittal and did not become a final judgment. There was neither a written or signed order nor an oral or written ruling on the record

sufficiently detailing the reasons for granting or denying the motion. Consequently, the defendant's constitutional right not to be placed twice in jeopardy was not violated by the submission of the issue to the jury.

I

The defendant and his two codefendants were charged with open murder and possession of a firearm during the commission of a felony, arising from the shooting death of Markeis Jones. Jones was shot during a confrontation between two groups of youths at Hamady High School in Flint. The defendant and his friends did not attend Hamady, but were waiting for friends who were attending a dance at the high school. In the school driveway the two groups of youths began arguing. There was some pushing and shoving and some verbal threats. Ultimately several shots were fired out of the back of a Mustang hatchback. Testimony indicated that defendant and codefendant Dameon Perkins fired shots from the back of the car. Codefendant Marcus Hopkins drove the car away as the shots were fired. There is some evidence in the record indicating that the shots missed their intended mark and inadvertently hit Markeis Jones, a friend of the defendants. There is also evidence in the record that the confrontation was gang related, involving rival groups known as "Folks Up" and "Folks Down."

All three young men were charged with open murder and felony firearm and were tried before two separate juries during one trial. Defendant Vincent and codefendant Hopkins were tried by one jury, while codefendant Perkins was tried by a second. At the close of the prosecution's case in chief, counsel for all three defendants moved

for directed verdicts of acquittal on the charges of first-degree murder, arguing that there was insufficient evidence of premeditation and deliberation and that the shooting was unplanned and spontaneous. The prosecution opposed the motion.

When defense counsel had completed their arguments on the motion, the trial court judge responded with the following comment:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then [sic] anyone else as I hear the comment made by Mr. Doll [counsel for Perkins] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

This discussion took place outside the hearing of the jury. Before adjourning the proceedings, the prosecutor requested time the next day to "make a brief restatement in terms of the First Degree Murder . . . ." The judge replied

that he would "be glad to hear it . . . [and that he was] always glad to hear [the] people."

The next day, the prosecution presented an argument regarding the quantum or threshold of evidence sufficient to survive a motion for a directed verdict on the charges of first-degree murder. After hearing both sides, and over the objections of defense counsel, the judge decided to reserve his ruling on the motion until he heard and thought more about the issues. Defense counsel maintained that the judge had directed a verdict resulting in a final judgment of acquittal regarding the first-degree murder charges, and that double jeopardy concerns were implicated.[1]

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[1] We note that in reserving his ruling on the motion for directed verdict that the trial judge violated MCR 6.419(A), which provides:

> After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. *The court may not reserve decision on the defendant's motion.* If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations. [Emphasis added.]

Defense counsel cited the rule, but did not object to the trial court's express decision to reserve its ruling on the motion. Counsel's objection was based on their belief that the judge directed a verdict and then changed his mind. We are persuaded that, under the circumstances of this case, any error that might have occurred from the judge's decision to reserve the motion was harmless. The issue was never discussed in front of, or taken from, the jury. Even though it is improper to reserve a ruling on this motion, because the defendant must have notice of the charges he is facing before presenting his proofs, we note that when Vincent testified he was still on notice that he was being tried for first-degree murder. Regardless of the propriety of reserving the motion, the

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The judge, reconsidering his earlier remarks, noted that the jury had not been informed of any of the discussion, and, therefore, the defendant had not been prejudiced. The judge was adamant that he had not directed a verdict, "I haven't directed a verdict to anybody . . . . Oh, I granted a motion but I have not directed a verdict." All three defendants were convicted: Vincent of first-degree murder, Hopkins of involuntary manslaughter, and Perkins of second-degree murder. All three appealed in the Court of Appeals.

Codefendant Hopkins, who had been convicted of involuntary manslaughter, raised the double jeopardy issue on appeal. In an unpublished opinion, the Court of Appeals held that the judge's ruling was not a final judgment or ruling, but the mere expression of an opinion.

> While the court expressed an opinion that ultimately would have ripened into a final ruling had nothing intervened and the court taken the issue from the jury, the court, before acting on its expressed opinion, agreed to hear further argument from the prosecutor regarding the issue. When the court recessed for the day, everyone was aware that the prosecutor was going to present further argument on the issue of first-degree murder the next morning, before defendants would proceed with their cases. The matter was

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charge was never dropped and the presentation of the defense was not impaired.

See *People v. Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1995) (postponing a hearing on a defendant's motion for directed verdict is harmless error where the prosecutor presented sufficient evidence to convict the defendant at the close of his proofs.)

> addressed the next morning, and the court reconsidered its opinion earlier expressed, concluding that it would reserve ruling. Thus, the record indicates that the court expressed an opinion, and then before finalizing that opinion, agreed to entertain further argument. The court did not make a final ruling until it denied defendant's motion for directed verdict and submitted the case to the jury. We conclude the court was not barred from further consideration of the matter. [Unpublished opinion per curiam, issued October 20, 1995 (Docket No. 158133), slip op. at 2.]

The Court also concluded that MCR 6.419, which bars the judge from reserving his ruling on the motion was not violated because in this case Hopkins did not present any proofs and the judge made clear that he wanted the jury to decide between the different degrees of murder. *Id.* at 3. The *Hopkins* Court also concluded that in viewing the evidence in the light most favorable to the prosecution there was sufficient evidence to support a conviction of first-degree murder. Consequently, the trial court did not err in denying the motion. *Id.*

Codefendant Perkins also raised the double jeopardy issue in his separate appeal. In an unpublished opinion, the Court of Appeals noted both that the trial of the first-degree murder charge continued after hearing the prosecution's arguments and that the jury was ultimately instructed on first-degree murder. Accordingly then, the Court held that "[s]ince the trial court had never indicated to the jury that it was directing a verdict of acquittal on first-degree murder, there was no prejudice to defendant and, more importantly, defendant's double jeopardy rights were not violated." Unpublished opinion per curiam,

issued November 21, 1995 (Docket No. 160177), slip op. at 2.

The *Perkins* Court held, just as the Court in *Hopkins,* that the prosecutor had presented sufficient evidence of premeditation and deliberation so the trial court did not err in denying the motion for directed verdict or in instructing the jury on the charge. "We are satisfied that the prosecution did present sufficient evidence from which a rational trier of fact could have concluded that the killing was done with premeditation and deliberation." *Id.*[2]

However, a third panel of the Court of Appeals heard defendant Vincent's appeal, and in a published opinion reversed the decision of the trial court. Vincent also argued that his conviction of first-degree murder violated his constitutional right not to be placed twice in jeopardy. 215 Mich App 458, 460; 546 NW2d 662 (1996). The Court agreed, reversed the conviction, and remanded the case "for entry of a conviction of second-degree murder and for resentencing." *Id.* at 471.[3] The Court conceded that the trial judge's first statement "Well, my impression at this time," was ambiguous, but that the later statement "What we have at the very best is second-degree murder," was not. *Id.* at 468.

[2] This case was remanded to the trial court for resentencing. The Court held that the sentence imposed at the maximum of the guidelines range, fifteen to twenty-five years, was inappropriate, given Perkins' age and lack of criminal history. *Id.* at 1.

[3] The Court noted it was not bound by the two earlier unpublished opinions pursuant to Administrative Order No. 1994-4 and MCR 7.215. *Vincent* at 463.

We reverse the decision of the Court of Appeals and hold, on the basis of the following evaluation, that the judge's inchoate impressions did not mature into a final judgment of acquittal of the charge. Consequently, Vincent's right not to be placed twice in jeopardy was not violated.[4]

[4] Because we have determined that in this case a judgment was not rendered, we need not reach whether or under what circumstances the judge can reverse or correct a ruling. However, we are aware that there is a split of authority among our sister states on this particular question. Compare *United States v. Washington,* 48 F3d 73, 79 (CA 2, 1995) ("oral grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment'" [citation omitted]); *In re Lionel F,* 76 NY2d 747, 749; 559 NYS2d 228, 558 NE2d 30 (1990) ("There is no constitutional impediment to a court's power to modify its decisions, provided such a modification does not subject an individual to double jeopardy" [citation omitted]); *People v. Dist. Court,* 663 P2d 616, 621 (Colo, 1983) ("we see no reason why the double jeopardy prohibition should preclude a trial judge from correcting during the trial itself an erroneous ruling on a motion for a judgment of acquittal when no threat of retrial would arise from the correction and the accused has suffered no demonstrable prejudice by reason of the correction"); *State v. Iovino,* 524 A2d 556, 560 (RI, 1987) ("the corrected ruling by the trial justice did not in any way inhibit defendant's presentation of any evidence that he might have chosen to adduce in respect to the greater as well as the lesser included offenses"); with *Watson v. State,* 410 So 2d 207, 209 (Fla, 1982) ("the ruling of the trial judge made the day before, without any indication that the matter was still under consideration, had progressed toward finality beyond the point that would permit its retraction or correction"); *Brooks v. State,* 308 Ark 660, 668; 827 SW2d 119 (1992) ("dismissing the robbery charge and then reinstating it at the conclusion of all the evidence could well have curtailed the appellant's ability to present a full defense to this charge").

II

A

We recognize that a judge's characterization of a ruling and the form of the ruling may not be controlling. *People v. Anderson,* 409 Mich 474, 486; 295 NW2d 482 (1980); *United States v. Martin Linen Supply Co,* 430 US 564, 571, n 9; 97 S Ct 1349; 51 L Ed 2d 642 (1977). "The Court must inquire whether 'the ruling in [defendant's] favor was actually an "acquittal" even though the District Court characterized it otherwise.' *United States v. Wilson,* 420 US 332, 336 [95 S Ct 1013; 43 L Ed 2d 232] (1975)." Ultimately what we must determine is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen* at 571.

Determining whether the trial court's statement, made at the conclusion of the defendant's motions for directed verdict, was tantamount to rendering a directed verdict is crucial because, if a directed verdict were rendered, further proceedings would violate the defendant's double jeopardy rights.

> [W]hen a trial court enters such a judgment, the Double Jeopardy Clause bars an appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into further proceedings devoted to the resolution of factual issues going to the elements of the offense charged. [*Smalis v. Pennsylvania,* 476 US 140, 142; 106 S Ct 1745; 90 L Ed 2d 116 (1986).]

Consequently, under federal precedent and our recent decision in *People v. Nix,* 453 Mich 619; 556 NW2d 866

(1996), characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions. However, we find that *Nix* is distinguishable from the case at bar. In *Nix,* we held that the judge's order in form and substance was a final judgment of acquittal. The judge undertook an evaluation of all the evidence and determined on the record that the evidence was insufficient to sustain a conviction on any count. A formal order was written and granted. Under those circumstances, we affirmed the Court of Appeals holding that the judge could not stay the entry of this order pending the prosecutor's appeal and thus avoid the defendant's protection against double jeopardy. *Id.* at 622-624. Whether or not erroneous, the judge evaluated the evidence and entered a formal judgment of acquittal.

Unlike the trial judge in *Nix,* the trial judge in *Vincent* did not undertake an evaluation of all the evidence, nor did he render a statement of sufficient clarity and finality that could be construed as an order. Taken in the context of the entire proceedings, the impressions of the judge cannot be transformed into a directed verdict on the issue of premeditation and deliberation. Consequently, we hold that the judge's comment did not represent an actual resolution of some or all of the factual elements of the offense charged. Therefore, further proceedings were not barred by the Double Jeopardy Clause, and the defendant's rights were not violated.[5]

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[5] Three protections are embodied in the Double Jeopardy Clause: protections "against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense."

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We reaffirm the principles articulated in *Nix, Anderson, Martin Linen,* and *Smalis* and now undertake to explain why in this case there was no directed verdict.[6]

B

In *People v. Hampton,* 407 Mich 354; 285 NW2d 284 (1979), this Court considered the standards for directed verdicts, recognizing that inconsistency existed among the published decisions of the Court of Appeals. *Id.* at 366. In *Hampton,* we discussed the quantum of evidence required to survive a motion for directed verdict. In assessing the sufficiency of evidence we held that

> the trial judge when ruling on a motion for a directed verdict of acquittal must consider the evidence presented by the prosecution up to the time the motion is made, . . . in a light most favorable to the prosecution, . . . and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt . . . . [*Id.* at 368.]

Justices of Boston Municipal Court v. Lydon, 466 US 294, 306-307; 104 S Ct 1805; 80 L Ed 2d 311 (1984). Because we hold that there was no acquittal in this case, the principles embodied within these protections were not violated.

[6] We respectfully disagree with the dissent's statement that we are wilfully violating the principles articulated in this line of cases. The facts in the case at bar are distinguishable from both *Anderson* and *Nix, supra. Nix* is discussed in the body of the opinion. *Anderson* involved a trial judge's decision to accept a midtrial plea of guilty of manslaughter. When the judge accepted the plea, he dismissed charges of first- and second-degree murder and discharged the jury. *Id.* at 480-481. *Vincent* does not involve either the stay of a formal order as in *Nix* or the acceptance of a plea and subsequent dismissal of both the charges and the jury as in *Anderson.* This case turns on the characterization of an ambiguous statement of a trial judge.

As we stated, had we determined that the judge's remarks represented an actual resolution of a factual element of the offense charged, we would be compelled to reverse the decision of the Court of Appeals. Here, we decided that these remarks did not sufficiently resolve anything.

Following our decision in *Hampton,* we stated that "[r]etrial is not permitted if the trial court evaluated the evidence and determined that it was legally insufficient to sustain a conviction." *People v. Mehall,* 454 Mich 1, 6; 557 NW2d 110 (1997) (citing *Martin Linen*). In *Mehall* we held that there was no acquittal and that a retrial was not precluded when the judge failed to properly consider all the evidence under the standard articulated in *Hampton.* See also *People v. Wolfe,* 440 Mich 508; 489 NW2d 748 (1992).

We are not convinced that the standards articulated in *Hampton* and *Mehall* were met in this trial judge's statement of his impressions, nor are we convinced that the judge's statement rose to the requisite level of certainty and finality to constitute a directed verdict. There was no indication in the record that the judge evaluated all the evidence in the light most favorable to the prosecution. *Mehall* at 6. There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the court considered or rejected because there was no mention of them reflected in the express remarks of the court. There was also no explicit reference to legal insufficiency. Further, although the judge mentioned that he was

considering all the factors, there was no indication which factors he had actually considered or rejected.[7]

Accordingly we hold this general inconclusive statement to be no more than a judge thinking out loud. The foundation laid to support this conclusory impression was inadequate. When ruling on the sufficiency of the evidence, a court must generally give a more particularized detailed analysis on the record of the evidence and reasoning that forms the basis of the decision and a clear statement that the motion is either granted or denied.

C

In *Tiedman v. Tiedman,* 400 Mich 571, 576; 255 NW2d 632 (1977), Justice LEVIN observed that "[t]he rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions. Generally, a judgment or order is reduced to written form, . . . until reduced to writing and signed, the judgment did not become effective. . . . " That case involved a civil

[7] Trial testimony indicated that the youths were going to Hamady to fight. They collected guns and ammunition and test-fired the weapons before arriving at the school. Vincent testified that he anticipated trouble because some other persons he might encounter did not like him. Further, testimony indicates that Vincent and Perkins reentered the Mustang together, knelt in the back seat, aimed the weapons out the raised hatchback, and commenced shooting. Further testimony indicated that the confrontation was gang related. From this, it is quite possible that a rational trier of fact could have found that the essential elements of the crime, premeditation and deliberation, were proven beyond a reasonable doubt. The trial court did not assess any of these proofs in the record or indicate why it might have believed that they were insufficient.

matter, but there is no reason that a lesser standard should be acceptable in criminal cases in which a defendant's liberty interest is at stake. Our rules of criminal procedure and our judgments based on them must not tolerate ambiguity or indecision in judgments rendered.

The Supreme Court of Washington has decided a case similar to the present one. In *State v. Collins,* 112 Wash 2d 303; 771 P2d 350 (1989), the trial judge orally dismissed a charge of third-degree assault as a result of the prosecutor's failure to produce sufficient evidence regarding the element of intent after hearing argument from both sides. *Id.* at 304. However, within minutes, the prosecutor offered further argument and authority, and the judge reinstated the charge. The defendant appealed, arguing that her double jeopardy rights had been violated.

In holding that the judge's oral ruling was not final when given, the Washington Supreme Court emphatically stated that it was returning to a "rule long followed in this state that a ruling is final only after it is signed by the trial judge in the journal entry or is issued in formal court orders." *Id.* at 308. In overruling a previous case embracing a rule that allowed for too many ambiguous and inconsistent results the court stated:

> The outcome of something as important as deciding whether a defendant was exposed to double jeopardy should not hang on such guesswork . . . . To serve the ends of certainty, reliance on the final written court order or written journal entry to determine the finality of a ruling is the better rule . . . [m]any judges will think out loud along the way to reaching the final result. It is only proper that this thinking process not have final or binding effect until formally incorporated

> into the findings, conclusions, and judgment. [*Id.*][8]

We agree with this simple straightforward reasoning. A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. This concept finds support in our own court rules. MCR 2.602(A) requires that judgments and orders be "in writing, signed by the court and dated with the date they are signed." None of the indicia of formality associated with final judgments are present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all. "Okay" does not equate with "It is so ordered." Further, we note that the trial court did not substantially comply with the requirement of MCR 6.419(D) that provides "[t]he court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal. . . . " As we stated in part II(B), the loose impressions of the judge cannot be construed as an adequate evaluation of the evidence. Instead, it reflects a tentative conclusion, not

[8] The standard overruled in *Collins* was enunciated in *State v. Dowling*, 98 Wash 2d 542, 547; 656 P2d 497 (1983), and provided that

> [a] finding by the court as the trier of fact, without a jury, when read conclusively into the record in such a manner as to indicate that it is neither tentative nor made with reservation or advisement nor subject to further consideration or proceedings in the same case, will support a judgment of acquittal or dismissal.

We note that even under this test, the trial court's impressions here would not support an acquittal because its comments were tentative, made with reservation, and subject to further consideration.

a formal resolution on the factual elements of the offense charged.

There was nothing to indicate that the judge's impression in this case was anything more than an initial assessment of a possible future ruling. *People v. Jackson*, 232 AD2d 193; 647 NYS2d 764 (1996). Similarly there was nothing to indicate that this was anything more than a continuing discussion between the parties. *State v. Newfield*, 161 Ariz 470, 472; 778 P2d 1366 (Ariz App, 1989). Further, we are inclined to agree with a decision of the United States Court of Appeals for the Second Circuit holding that a judge's decision to submit the charge to the jury implicitly denies the motion. *United States v. Bruno*, 873 F2d 555, 562 (CA 2, 1989).

The fact that the judge decided to entertain additional arguments the next day is further indication that he had not made a final decision. We are aware that how the judge characterizes his statement is not controlling, nor is the form of the so-called ruling controlling, but in this case we find that the judge was correct. He had not directed a verdict. Statements couched in the terms "my impression," "I think," "in the event that it's not our premeditation planning episode," and "[i]t may very well be," do not resound in finality. To the contrary they are clearly equivocal. We would be hard pressed to call this kind of indecisive pondering a final judgment of acquittal.[9]

[9] We note that MCR 2.602(A) governs entry of judgment and orders in civil proceedings and that MCR 6.419 provides the rules to be followed in criminal proceedings. We are aware that the rules do not mandate formal motions or rulings, however, it is clear that a certain degree of formality is required. MCR 6.419 allows the trial court to

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III

We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

BOYLE, RILEY and WEAVER, JJ., concurred with MALLETT, C.J.

CAVANAGH, J. (*dissenting*). This case presents the identical issue we dealt with earlier this term in *People v.*

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state orally, or in writing, its reasons for denying or granting the motion. We leave trial judges with this choice, but caution that, whichever form is employed, the judgment must bear sufficient indicia of finality to survive an appeal. Factors that might be considered in evaluating finality, in addition to a clear statement in the record or a signed order, might also include an instruction to the jury that a charge or element of the charge has been dismissed by the judge or that a docket entry has been made reflecting the trial court's action. These examples are illustrative only because each case will turn on its own particular circumstances.

Nix, 453 Mich 619; 556 NW2d 866 (1996), which decision was based on controlling case law from the United States Supreme Court and this Court's acknowledgment of those binding precedents in *People v. Anderson*, 409 Mich 474; 295 NW2d 482 (1980). The majority purports to "reaffirm the principles articulated in *Nix* [and] *Anderson*," *ante*, p 121, but in fact departs from those principles. In so doing, the majority violates the rule of law. Accordingly, I dissent.

I

The legal principles that are dispositive of this case have not changed since they were set forth in *Nix*:

> In *Fong Foo v. United States*, 369 US 141; 82 S Ct 671; 7 L Ed 2d 629 (1962), the trial court, during presentation of the prosecutor's case in chief, "directed the jury to return verdicts of acquittal as to all the defendants, and a formal judgment of acquittal was subsequently entered." *Id.* at 142. On appeal, the United States Court of Appeals for the First Circuit held that the district court was without power to direct the acquittals, and ordered the case remanded to the trial court. On further appeal, the United States Supreme Court held as follows: "The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, '[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the constitution.'" *Id.* at 143 (citing *United States v. Ball*, 163 US 662, 671; 16 S Ct 1192; 41 L Ed 300 [1896]).
>
> In *United States v. Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642

(1977), the United States Supreme Court reaffirmed this principle from *Ball* and *Fong Foo,* stating: "[W]e have emphasized that what constitutes 'an acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." (Citations omitted.)[4]

[4] This principle was more recently reaffirmed in *Smalis v. Pennsylvania,* 476 US 140; 106 S Ct 1745; 90 L Ed 2d 116 (1986).

In *People v. Anderson*, 409 Mich 474, 486; 295 NW2d 482 (1980), this Court acknowledged and applied this legal principle:

"To be sure, the judge did not say that he was directing a verdict, and no formal judgment of acquittal was entered. The determination of what the judge did, however, does not turn on how the judge characterizes his actions. '[T]he trial judge's characterization of his own actions cannot control the classification of the action.'[24] What constitutes an 'acquittal' is not controlled by the form of the judge's action.[25]

"To decide how a trial judge's action should be characterized, the reviewing court 'must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'[26] There is an acquittal and retrial is impermissible when the judge 'evaluated the Government's evidence and

determined that it was legally insufficient to sustain a conviction.'[27]

[24] *United States v. Scott* [437 US 82, 96; 98 S Ct 2187; 57 L Ed 2d 65 (1978)], quoting *United States v. Jorn* [400 US 470, 478, n 7; 91 S Ct 547; 27 L Ed 2d 543 (1971)] (plurality opinion). See *United States v. Martin Linen Supply Co, supra*. . . .

[25] *United States v. Martin Linen Supply Co, supra*, p 571.

[26] *Id.*

[27] *Id.*, p 572. See *People v. Hampton,* 407 Mich 354, 385-386; 285 NW2d 284 (1979) (RYAN, J.)."

[*Nix*, 453 Mich 624-626.]

The insignificant factual distinctions between *Nix* and the case at bar relied on by the majority notwithstanding, the application of these legal principles to the instant case is straightforward and warrants affirmance of the Court of Appeals.

II

A

In my opinion, the outcome of this case is determined by the following facts: the statements of the trial judge at issue here were made after the close of the prosecutor's case in chief and were in response to defense counsel's motions for directed verdicts of acquittal on the first-degree murder charges; the judge's statements expressed his legal opinion of the legal sufficiency of the evidence

presented relative to the appropriate degree of murder that a reasonable jury could find defendants guilty of; at the separate hearing conducted the next day there was no new evidence introduced; and, at this next day hearing, the trial judge, in response to defense counsel's argument that he had directed a verdict, said, "Oh, I granted a motion but I have not directed a verdict." [1]

Applying the controlling legal principles to these facts, I can only conclude that the trial judge considered all the prosecutor's evidence, and that, in his opinion,[2] that

[1] This latter statement of the trial judge evidences his belief that he had to actually instruct the jury on the charges it could consider before it could be said that he had directed a verdict on the first-degree murder charges. This statement by itself constitutes sufficient evidence that the trial judge was certain that he had ruled on the evidence relative to the first-degree murder charges. His belief that he could reverse that ruling simply because the jury did not know about it is clearly at odds with the legal principles reiterated in part I of this opinion.

In addition to the fact that the trial judge's understanding of the controlling legal principles was erroneous, the majority's conclusion that the trial judge's violation of MCR 6.419(A) was harmless error because "the presentation of the defense was not impaired," *ante*, p 631, n 1, is equally baseless. The defendant did not know what charges would be submitted to the jury, depriving him of knowledge he had an undisputed right to, knowledge that could have affected the presentation of his defense. More importantly, however, I reject the majority's attempt even to apply a harmless error analysis in this case. An error affecting a defendant's federal constitutional right not to be placed twice in jeopardy is not susceptible of harmless error analysis. The majority's attempt to employ this analysis is erroneous on its face, but is even more so by virtue of its mischaracterizing a federal constitutional violation as a mere violation of a state court procedural rule.

[2] Or his "impression" or his "think[ing]" or any other synonymous term that, in this context, connotes his "evaluation" of the evidence.

evidence was legally insufficient to allow a charge of first-degree murder to be submitted to the jury. "To be sure, the judge did not say that he was directing a verdict, and no formal judgment of acquittal was entered. The determination of what the judge did, however, does not turn on how the judge characterizes his actions." *Anderson,* 409 Mich at 486.

B

The trial judge's comments were as follows:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then [sic] anyone else as I hear the comment made by Mr. Doll [counsel for Perkins] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

The majority seizes upon the word "impression," when in fact the determinative phrase is "at this time" because this latter phrase refers to a chronological point after the

prosecution had presented all its evidence and closed its case in chief.[3]

The majority's selective extraction of two other phrases – "in the event that it's not our premeditation planning episode" and "[i]t may very well be" – further ignores the conclusive nature of the trial judge's statements. This is readily demonstrated by reading these phrases in their true context.

Referring to the participation of all three defendants in the crime for which they were tried, the trial judge said: "But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode." If looked at objectively, it should not be difficult to decipher the essential meaning of this sentence: Looking at the big picture with respect to what part, if any, each and every one of these defendants played in this event, it is not a case involving premeditation or planning.

The other phrase taken out of context by the majority undermines further its attempt to find uncertainty and indecision where, in fact, there exists judicious consideration and decision. The relevant sentence is, "'It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the

[3] The majority utilizes phrases such as "the judge's inchoate impressions," *ante,* p 118, "this conclusory impression," *id.* p 123, and "the loose impressions of the judge," *id.* p 125. None of these phrases, in my opinion, undermines the true character of the trial court's action.

planning of premeditation.'"[4] Paraphrased, accurately and in its entirety, the essence of this sentence is as follows: The fact that defendants had weapons may be evidence of their bad judgment, and it is evidence to be considered in determining their intent, but the mere existence of the weapons per se does not prove the premeditation or planning required for a charge of first-degree murder.[5] And the very next statement of the trial judge, ignored by the majority, shows the truly deliberative nature of his comments: "I have to consider all the factors." Then, having considered all the evidence, having looked at the "broad scope" of the circumstances of the crime, having "consider[ed] all the factors," the trial judge concluded: "And I think that Second Degree Murder is an appropriate charge as to the defendants."

C

The majority's disregard for the principles articulated in *Nix* and *Anderson* leads to its reliance on several irrelevant factors.

The majority emphasizes that the trial judge's statements were made "outside the hearing of the jury." *Ante*, p 114. This fact is of no consequence whatsoever for purposes of applying the federal constitutional decisions of the

[4] *Ante*, p 114.

[5] In rephrasing these statements of the trial judge, I imply no criticism whatsoever, grammatical or otherwise. The extemporaneous comments of a trial judge in the heat of trial should not be held to the same standards of grammar and diction one should rightly expect from the solitude of appellate chambers.

United States Supreme Court that we acknowledged and applied in *Nix* and *Anderson*.[6]

The majority also inappropriately relies on the majority decision of the Supreme Court of Washington in *State v. Collins*, 112 Wash 2d 303; 771 P2d 350 (1989). There are several reasons that this reliance is inappropriate, the dispositive one being that the *Collins* majority does not even purport to follow the relevant case law of the United States Supreme Court.[7] In fact, the *Collins* majority fails to even cite the relevant United States Supreme Court cases.[8]

III

In my opinion, the statements of the trial judge, made in response to defense counsel's motions for directed verdict of acquittal on the charges of first-degree murder, constitute "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply*, 430 US 571. Therefore, under the clear and controlling case law of the United States Supreme Court, "[t]he court's reversal of its directed verdict resulted in

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[6] I would also point out that during a jury trial, motions for directed verdict (and other motions seeking a legal ruling from the judge) are routinely argued and decided without the jury being present.

[7] Other reasons that the *Collins* decision is inapposite to the case at bar include the fact that *Collins* dealt with a bench trial and, more importantly, the *Collins* majority considered the issue before it solely in the context of a rule that Court previously had set forth purely as a matter of state law.

[8] The dissenting justice, however, correctly cites and applies *Fong Foo* and *Martin Linen Supply*. See *Collins, supra*, pp 311-314, 771 P2d 350.

further proceedings in which the jury resolved factual issues concerning the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge." 215 Mich App 458, 469; 546 NW2d 662 (1996) (citing *Smalis v. Pennsylvania, supra*).

I would affirm the decision of the Court of Appeals.

BRICKLEY and KELLY, JJ., concurred with CAVANAGH, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUYONN ANDRE VINCENT,

Petitioner,

vs.

KURT JONES,

Respondent.

CIVIL NO.:
98-CV-40007-FL

HONORABLE
PAUL V. GADOLA
HONORABLE
MARC L. GOLDMAN

REPORT AND RECOMMENDATION

I. INTRODUCTION

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. On April 3, 1992, Petitioner Duyonn Andre Vincent was found guilty of first-degree murder, M.C.L. §750.316, and possession of a firearm during the commission of a felony [felony firearm], M.C.L. §750.227b, following a jury trial before Judge Donald R. Freeman in the Genesee County Circuit Court. Petitioner was sentenced to a mandatory term of life imprisonment without the possibility of parole on the murder conviction and to a mandatory two-year term on the felony firearm conviction. At the time he filed this petition, Petitioner was incarcerated at Carson City Regional Facility in Carson City, Michigan. Respondent Kurt Jones is the Warden of that facility.

II. PROCEDURAL HISTORY

The facts giving rise to this petition are as follows.[1] Petitioner and co-defendants Dameon Perkins and Marcus Hopkins were jointly tried[2] on the charges of open murder[3] and possession of a firearm during the commission of a felony. On March 31, 1992, after the prosecution rested its case on March 31, 1992 and outside of the presence of the jury, Petitioner moved for a directed verdict of acquittal on the charge of first-degree murder based on the prosecution's alleged failure to present evidence establishing the elements of premeditation or deliberation.[4] The trial court heard argument from all of the attorneys. Defense counsel argued that even viewed in the light most favorable to the prosecution, there was insufficient evidence of premeditation and deliberation to permit the charge of first-degree murder to be considered by the jury. *See* Tr. Trans., Vol. IV, pp. 106-107. Defense counsel asked the court to dismiss the first-degree murder charge and to have the trial constinue [sic] on the charge of second-degree murder. The prosecutor opposed the motion. In doing so, he discussed the evidence presented which he believed established the

[1] The facts leading to Petitioner's convictions are set forth in *People v. Vincent*, 455 Mich 110, 565 N.W.2d 629 (1997), and need not be repeated here. Only the procedural aspects of this case are relevant to the issue before this court.

[2] Vincent and Hopkins were tried by one jury, while Perkins was tried by a second.

[3] The charge of open murder permits the finder of fact to determine the degree of murder. First-degree murder requires proof of premeditation and deliberation. M.C.L. § 750.316.

[4] The other two defendants also moved for directed verdict on the first-degree murder charge.

elements of premeditation and deliberation. *Id.* at pp. 111-116. Following completion of the arguments, the court stated:

> Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else as I hear the comment made by Mr. Doll [Perkins' attorney] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. *I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.* [emphasis added]

Id. at p. 117. The court and counsel then discussed several unrelated matters. Before adjourning for the day, but after Petitioner and his co-defendants had been removed from the courtroom, the prosecutor asked if he could make a "brief restatement in terms of the First-degree Murder [charge]" when the jury returned on the following day because he wanted to "find some law." *Id.* at p. 123. The court responded: "Yes, I'll be glad to hear it. Sure. I'm always glad to hear people." *Id.* The court then adjourned for the day. Significantly, the docket shows an entry on March 31, 1992 stating:

> MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER. CT: II FEL. FIREARM STAY THE SAME.

Petition, Appendix E.

The following morning, April 1, 1992, again outside of the presence of the jury, the prosecutor argued that based on the case law and the evidence, the jury should be allowed to determine whether first-degree murder had been established. Tr. Trans., Vol. V-A, pp. 3-17. Defense counsel argued that the court had directed a verdict of not guilty on the charge of first-degree murder the previous day and objected to the court's reconsideration of that decision on the basis of the constitutional prohibition against double jeopardy. *Id.* at p. 18-19. The following discussion then took place:

> THE COURT: Counsel, you have to bear in mind, I've not informed the jury of any of these things. You must recall the fact that we did not have the jury even brought back to the room. That because of our schedule and because of the representation made by Mr. Doll as to witnesses and the length of time that would be needed, we decided it might be better to start this morning so as to have some continuity in their testimony.
>
> MR. ODETTE [Petitioner's trial counsel]: Right, Judge, I . . .
>
> THE COURT: So the jury knows nothing about any of this.
>
> MR. ODETTE: That's correct, they don't. I'm not disputing that but it's my firm impression when I left the court yesterday that there had been a ruling and that [the prosecutor] had indicated

he'd like to have the matter reconsidered and I believe the Court said whatever.

THE COURT: That's right. And I, well I said "yes I'd be glad to listen" or words to that effect.

MR. ODETTE: Well it's our position that at this point that that decision was made. We . . .

THE COURT: Do you really believe that? You think that when a decision is made that before it's recited to the parties who are involved in it and particularly to the jury because we're asking now for the jury to not consider certain factors that might be brought to them, that a Court cannot consider what it's done? I don't know that that's right. I, I consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not, I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.

MR. ODETTE: That's . . .

THE COURT: You understand what I'm saying?

MR. ODETTE: I do.

THE COURT: And I've not told the jury anything.

MR. ODETTE: I do entirely, I don't dispute any of that. But I, it was my firm impression and belief that the Court had made a ruling . . .

THE COURT: All right.

Id. at pp. 18-20.

Petitioner's attorney then addressed the merits of the prosecutor's argument regarding deliberation and premeditation. Hopkins' attorney reiterated the arguments of Petitioner's counsel on the issue of double jeopardy. The court insisted that it had not directed a verdict as to anybody the previous day. *Id.* at p. 22. However, when Hopkins' counsel stated that the court had granted the motion, the court replied: "Oh, I granted a motion but I have not directed a verdict." *Id.* at pp. 22-23.

In response to the arguments presented by counsel for Perkins, the prosecutor presented further argument to support his position that there was sufficient evidence of premeditation to permit the charge of first-degree murder to be submitted to the jury. The trial court took the matter under advisement, stating:

> Well I'm going to consider the argument that Counsel has made. And Counsel should be certainly aware of the fact that there has been no harm that has come about by the Court[']s ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it.

Id. at p. 30. That afternoon, Petitioner's counsel presented one defense witness and Petitioner testified on his own behalf.

The following morning, April 2, 1992, after all the defendants had rested their cases, the court stated: "I've reconsidered the ruling the Court earlier made and I've decided to let the jury make its own determination on the Degrees." Tr. Trans., Vol. VI, pp. 3-4. The court submitted

the charge of first-degree murder to the jury, and the jury found Petitioner guilty of first-degree murder and of felony firearm.[5] Petitioner's counsel renewed his motion for directed verdict, but the court denied it. Tr. Trans., Vol. VII, pp. 79-80. Petitioner was sentenced on May 14, 1992 to mandatory life in prison.

Following his convictions and sentence, Petitioner appealed as of right to the Michigan Court of Appeals. The primary issue on appeal was whether the trial court had violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution by reversing its grant of a directed verdict on the charge of first-degree murder. The Michigan Court of Appeals agreed that Petitioner's conviction for first-degree murder had violated his constitutional right not to be placed twice in jeopardy. In a published opinion, the Michigan Court of Appeals reversed the first-degree murder conviction and remanded the case for entry of a second-degree murder conviction and for re-sentencing. *People v. Vincent*, 215 Mich App 458, 546 N.W.2d 662 (1996). Relying on *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), the court explained:

> [W]e are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the

[5] Perkins' jury convicted him of second-degree murder and felony firearm. Hopkins' jury, the same as Petitioner's, convicted Hopkins of involuntary manslaughter and felony firearm.

> first-degree murder charge in violation of defendant's double jeopardy rights.
>
> * * *
>
> The fact that the trial court in the case at bar did not inform the jury that it had directed a verdict of not guilty on the first-degree murder charge did not prevent its ruling from taking effect.
>
> * * *
>
> The trial court communicated its decision directing a verdict of acquittal on the first-degree murder charge to the prosecutor, all three defense counsel, and all three defendants. This made the court's ruling binding.

Vincent, 546 N.W.2d at 665-666.

The state then filed an application for leave to appeal in the Michigan Supreme Court. That application was granted. In a decision dated June 15, 1997, the Michigan Supreme Court reversed the decision of the Michigan Court of Appeals and reinstated the first-degree murder conviction by a vote of four to three. *People v. Vincent*, 455 Mich 110, 565 N.W.2d 629 (1997). The Michigan Supreme Court stated:

> We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the

> sufficiency of the evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

Vincent, 565 N.W.2d at 636.

However, the dissent disagreed with this characterization. Justice Michael Cavanaugh, in an opinion joined by two other justices, wrote:

> In my opinion, the statements of the trial judge, made in response to defense counsel's motions for directed verdict of acquittal on the charges of first-degree murder, constitute "a resolution, correct or not, of some or all of the factual elements of the offense charged." [*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).] Therefore, under the clear and controlling case law of the United States Supreme Court, "[t]he court's reversal of its directed verdict resulted in further proceedings in which the jury resolved factual issues concerning the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge." [*Vincent*,] 215 Mich. App. 458, 469, 546 N.W.2d 662 (1996) (citing *Smalis v. Pennsylvania, supra*).

Vincent, 565 N.W.2d at 639.

Petitioner filed a motion for reconsideration, directing the court's attention to the docket entry of March 31, 1992. Petitioner argued that the entry reflected the trial court's decision to grant the motion for directed verdict on the first-degree murder count. The Michigan Supreme Court denied reconsideration by a vote of five to two. *People v. Vincent*, 456 Mich. 1201 (1997).

Petitioner filed a petition for a writ of certiorari in the United States Supreme Court. On November 10, 1997, the United States Supreme Court denied the petition. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Petitioner, represented by counsel, then filed this petition for writ of habeas corpus. Petitioner contends that the trial court's statement on March 31, 1992 constituted an acquittal on the charge of first-degree murder and thereby terminated his jeopardy with respect to that offense. In support of this interpretation, he notes that the trial court's decision is memorialized in the docket entry stating that the charge of open murder was reduced to second-degree murder. Petitioner requests this court to order the State of Michigan to reduce his first-degree murder conviction to second-degree murder and to resentence him on the reduced charge.

Respondent contends that Petitioner has not demonstrated that the Michigan Supreme Court's decision was contrary to clearly established law, as determined by the United States Supreme Court. He further argues that the Petitioner has not shown that the state court decision was based on an unreasonably determination of the facts presented in light of the evidence. *See* 28 U.S.C. § 2254(d). Petitioner filed a reply and this matter is ready for decision.

III. ANALYSIS

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ["AEDPA"] created a new standard of review that federal courts must apply when reviewing applications for a writ of habeas corpus filed after April 24, 1996, the effective date of the act. That standard of review is codified in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The United States Supreme Court has recently explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000). *See also Machacek v. Hofbauer*, 213 F.3d 947, 953 (6th Cir. 2000). In *Williams*, the Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable . . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

In deciding whether a state court's factual determination is reasonable, a federal court must presume the correctness of state court factual determinations. 28

U.S.C. § 2254(e)(1)[6]; *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous"). A petitioner may rebut the presumption of correctness only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). However, the 'presumption only applies to basic, primary facts, and not to mixed questions of law and fact." *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir. 2000); *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996). It also applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility. *Coe v. Bell*, 209 F.3d 815, 823 n. 2 (6th Cir.), *cert. denied*, 120 S.Ct. 1716 (2000). For this purpose, "factual issues" are defined as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" *Bryson v. Ward*, 187 F.3d 1193, 1211 (10th Cir. 1999) (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n. 6 (1963)). *See also Carter*, 218 F.3d at 590. With these standards in mind, I will address the merits of the petition for writ of habeas corpus.

B. Double Jeopardy

Petitioner contends that his conviction for first-degree murder violates the Double Jeopardy Clause of the Fifth Amendment. He contends that the trial court granted his

[6] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

motion for directed verdict on the charge of first-degree murder based on insufficient evidence of premeditation and deliberation, then reconsidered and reversed its ruling and submitted that charge to the jury. Petitioner submits that under these circumstances, he was twice placed in jeopardy on the charge of first-degree murder.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," U.S. Const. amend. V., and applies to state prosecutions through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The Double Jeopardy Clause provides three separate protections for criminal defendants, one of which is the protection against a second prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted).

In *Serfass v. United States*, 420 U.S. 377, 387-388 (1975), the Supreme Court articulated the purposes of the constitutional protection against double jeopardy, stating:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to live in a continual state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."

(quoting *Green v. United States*, 355 U.S. 184, 187-188 (1957)).

Under clearly-established federal law, as determined by the United States Supreme Court, if a trial court has evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction, that determination of insufficiency is an acquittal for purposes of the Double Jeopardy Clause; further proceedings – appeal by the prosecution or retrial – are barred. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). *See Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986) (holding that grant of demurrer at the close of the prosecution's case-in-chief because of insufficient evidence was actually an acquittal). Indeed, a determination that there was insufficient evidence for conviction, whether rendered by the jury or directed by the trial judge, operates as an "absolute[ ] shield[ ]" against retrial under the Double Jeopardy Clause. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

In deciding whether Petitioner's double jeopardy rights under the Fifth Amendment were violated, a determination must be made as to whether the trial court's statements on March 31, 1992 concerning the sufficiency of the evidence of deliberation or premeditation, an essential element of the charge of first-degree murder under Michigan law, was actually an "acquittal" on that charge. If so, Petitioner was subjected to further proceedings in violation of the Double Jeopardy Clause when the trial court reversed its ruling and allowed the jury to consider the charge of first-degree murder.

In determining whether the trial court's statement constituted an "acquittal," a reviewing court must assess

whether the substance, not the form, of the trial court's ruling, "whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571 ("what constitutes an 'acquittal' is not to be controlled by the form of the judge's action"). The reviewing court does not, however, review the trial court's ruling to determine whether it was correct. The Supreme Court, in *Sanabria v. United States*, 437 U.S. 54 (1978), declared that "there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be." *Id.* at 75 (citing *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).

In *Smalis*, a husband and wife, who owned a building housing a restaurant and an apartment, were charged with various crimes in connection with a fire in the building. At the close of the prosecution's case-in-chief, the defendants challenged the sufficiency of the evidence by filing a demurrer. The trial court sustained the demurrer, saying it was not satisfied there was sufficient evidence from which it could be concluded that either of the defendants were guilty beyond a reasonable doubt. The issue was whether the State's attempt to appeal that decision would violate the Double Jeopardy Clause. The Superior Court of Pennsylvania quashed the appeal, holding that it was barred by the Double Jeopardy Clause. *Commonwealth v. Smalis*, 480 A.2d 1046 (1984). In a consolidated appeal by the Commonwealth, the Supreme Court of Pennsylvania reversed, finding no double jeopardy violation on the basis that a "demurrer [wa]s not a factual determination. . . . [T]he question before the trial judge in

ruling on a demurrer remain[ed] purely one of law." *Commonwealth v. Zoller*, 490 A.2d 394, 401 (1985).

The United States Supreme Court granted certiorari and reversed the Pennsylvania Supreme Court. The Court found first that the sustaining of a demurrer constitutes an acquittal under the Double Jeopardy Clause. Significantly, the Court noted that "the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer [wa]s not binding on [them]." *Smalis*, 476 U.S. at 144 n. 5. Next, the Court rejected the Commonwealth's argument that resuming the trial following a reversal on appeal would simply constitute "continuing" jeopardy, rather than double jeopardy, concluding that an acquittal terminated the proceeding. The Court stated:

> When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Martin Linen*, 430 U.S. at 570.

Smalis, 476 U.S. at 145-146.

The question of whether the Double Jeopardy Clause bars a prosecution is not determined by the characterization of the trial court's actions under state law, nor by the trial judge's understanding in this regard. *Smalis*, 476 U.S. at 144 n. 5; *United States v. Scott*, 437 U.S. 82, 96 (1978); *United States v. Sisson*, 399 U.S. 267, 290 (1970). The determinative factor is whether the decision is actually an acquittal for double jeopardy purposes, even if state law or the trial court may have characterized it otherwise. *See Martin Linen*, 430 U.S. at 571 n. 9.

In examining the trial court's March 31, 1992 statement, the Michigan Supreme Court found that it did not represent "an actual resolution of some or all of the factual elements of the offense charged" because:

> the trial judge . . . did not undertake an evaluation of all the evidence, nor did he render a statement of sufficient clarity and finality that could be construed as an order. Taken in the context of the entire proceedings, the impressions of the judge cannot be transformed into a directed verdict on the issue of premeditation and deliberation.

Vincent, 565 N.W.2d at 633. The court further stated that:

> [t]here was no indication in the record that the judge evaluated all the evidence in the light most favorable to the prosecution. There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the court considered or rejected in the express remarks of the court. There was also no explicit reference to legal insufficiency. Further, although the judge mentioned that he was considering all the factors, there was no indication

which factors he had actually considered or rejected.[7]

Id. at 634. The Michigan Supreme Court found that the trial court's statement reflected only "a tentative conclusion" or an "initial assessment of a possible future ruling." *Id.* at 635. It also noted that the trial judge's use of statements such as "[m]y impression," "I think," and "it may very well be," did not "resound in finality" and were "clearly equivocal" and, therefore, considered his statements to be "no more than a judge thinking out loud." *Id.* at 634-635. The court concluded that because the trial court's "indecisive pondering" lacked sufficient indicia of formality associated with a final judgment, it did not constitute an acquittal. Accordingly, the court held that the continuation of the trial and Petitioner's subsequent conviction of first-degree murder did not violate his constitutional rights. *Id.* at 635-636.

The decision of the Michigan Supreme Court that the trial court's assessment of the evidence on March 31, 1992 was erroneous and that under Michigan law, his statements were not sufficiently clear to constitute a final judgment, is not determinative of whether that ruling constitutes an acquittal for double jeopardy purposes. Under *Smalis*, a federal court is not required to defer to

[7] In a footnote, the court discussed the evidence presented at trial which it believed could have proved beyond a reasonable doubt the elements of premeditation and deliberation and noted that the "trial court did not assess any of these proofs in the record or indicate why it might have believed that they were insufficient." *Id.* at 634 n. 9. Whether or not the trial court's ruling was erroneous is irrelevant for purposes of determining whether that ruling constitutes an acquittal. *See Sanabria*, 437 U.S. at 75.

the conclusion of the Michigan Supreme Court that the trial court's statement did not constitute an acquittal under state law.[8] While the state courts can undoubtedly determine what is necessary, as a matter of state law, to sufficiently articulate a "final judgment" of acquittal, the issue before this court does not require a review of that decision, which involves a question of state law that is obviously beyond the scope of federal habeas review.

This case does not present a factual dispute. The trial court's statements are not contested. Rather, it is the legal consequences of those statements which are in dispute. The legal consequences turn, as in *Smalis* on an interpretation of double jeopardy law under the Constitution. Therefore, the sole issue before this court is the federal question of whether the trial court's March 31, 1992 statement constituted an "acquittal" on the charge of first-degree murder, which would bar any "further proceedings . . . devoted to the resolution of factual issues going to the elements" of that offense. *Smalis*, 476 U.S. at 145-46 (citing *Martin Linen*, 430 U.S. at 570).

Applying the controlling legal principles established by Supreme Court precedent, I find that the trial court's statement "actually represents a resolution [in Petitioner's

[8] At the hearing on this petition, the Court brought to the parties' attention an unpublished opinion of the Ninth Circuit in which the court found that the state court's determination of what constituted an acquittal was binding for purposes of double jeopardy. *Bergstrom v. Walter*, ___ F.3d. ___, 1998 WL 391469 (9th Cir. April 16, 1998). However, upon reviewing the case upon which the Ninth Circuit relied in making that statement, *see Bonillas v. Hill*, 134 F.3d 1414 (9th Cir. 1998), I conclude that *Bergstrom* is both factually and legally inapplicable to this case.

favor] . . . of some or all of the factual elements" of first-degree murder and, therefore, constitutes an "acquittal" for double jeopardy purposes. *Martin Linen*, 430 U.S. at 571. The undisputed facts show that the trial court's statement was made after the prosecution had rested its case and immediately following oral argument on Petitioner's motion for directed verdict in which the evidence of deliberation and premeditation was discussed by both sides. The trial court assessed the sufficiency of that evidence and concluded that "Second Degree Murder [wa]s an appropriate charge as to the defendants." The factors relied on by the Michigan Supreme Court, i.e., that the trial court's decision had not become final; that the trial judge did not sufficiently discuss all the evidence; that the trial judge's remarks were made outside of the presence of the jury; and that there was no oral or written ruling clearly detailing the exact reasons for granting the motion; are all irrelevant. The substance of the trial court's statements was clearly a determinative ruling on the sufficiency of the evidence of premeditation and deliberation and constituted a verdict of acquittal on the first-degree murder charge for double jeopardy purposes. *See United States v. Ball*, 163 U.S. 662, 671 (1896) ("[A] verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."). Indeed, that decision was formalized by the docket entry of March 31, 1992, indicating that the charge of open murder was amended to second-degree murder.[9]

[9] As pointed out by Petitioner, the Michigan Supreme Court stated in a footnote that one factor to be considered in evaluating "finality" is a docket entry reflecting the trial court's action. *Vincent*, 565 N.W.2d at

(Continued on following page)

Adding weight to this conclusion is the trial judge's characterization of his March 31, 1992 statement as a ruling during the arguments on the following day. Indeed, the trial judge specifically referred to his statements as "the Court[']s ruling." The trial court also specifically acknowledged that it had "granted a motion," but maintained that it could revisit its earlier ruling without violating the Double Jeopardy Clause because it had not "directed a verdict" or informed the jury of that ruling. The conclusion that the trial judge could reconsider and reverse his initial ruling simply because he had not actually informed the jury or directed a verdict to the jury is simply erroneous. "It is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal." *Sanabria*, 437 U.S. at 65 n. 18 (citing *Martin Linen*, 430 U.S. at 567 n. 5, 573; *United States v. Sisson*, 399 U.S. 267, 290 (1970)). The trial court explicitly informed all of the necessary parties, namely Petitioner, his co-defendants, and all counsel that the appropriate charge was second degree murder. This was an acquittal on the charge of first-degree murder for jeopardy purposes. The trial judge's attempt to modify the effect of his ruling by hearing arguments from the prosecution on the following

635 n. 9. Apparently, no one was aware at the time of the decision that any such entry had been made. Notwithstanding the discovery of the docket entry, the Michigan Supreme Court denied Petitioner's request for reconsideration on this basis.

day does not change the substance of his decision on March 31, 1992.[10]

There is no indication whatsoever in the trial court's March 31, 1992 statement that the trial judge believed that he had taken the matter under advisement, had reached only a "tentative conclusion," or was simply "thinking out loud," as found by the Michigan Supreme Court. Contrary to the Michigan Supreme Court's interpretation of the trial judge's statement, it was not inchoate or ambiguous, nor made subject to further consideration or advisement. It was an explicit finding that the evidence was insufficient to support a verdict of first-degree murder.

I therefore find, based upon the record as a whole, that the trial court's statement on Petitioner's motion for a directed verdict constituted a decision that the evidence presented by the prosecution was insufficient to show premeditation or deliberation to convict Petitioner of first-degree murder and was an acquittal for the purposes of the Double Jeopardy Clause under clearly-established

[10] As the Supreme Court has indicated, the principles embodied in the constitutional guarantees against double jeopardy protect an individual from repeated attempts by the state with all its resources and power to convict him of an alleged offense, thereby subjecting him "to live in a continual state of anxiety and insecurity." *See Serfass*, 420 U. S. at 387-388. It is important to note that it was not until after Petitioner had been removed from the courtroom on March 31, 1992, following the trial court's statement that the evidence was insufficient to establish first-degree murder, that the trial court agreed to permit the prosecution to make additional arguments the next day. Therefore, at the time Petitioner had left the courtroom for the day, he could only have been under the impression that he had been acquitted of first-degree murder.

precedent of the United States Supreme Court. That the trial court later reconsidered its ruling or may have erred in its initial ruling is of no significance. *See Sanabria*, 437 U.S. at 68-69 (erroneous evidentiary ruling leading to erroneous judgment of acquittal for insufficient evidence bars further prosecution). The trial court's reconsideration and reversal of its March 31, 1992 decision subjected Petitioner to "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged" in violation of the Double Jeopardy Clause. *Smalis*, 476 U. S. at 145-46.

Although the decision of the Michigan Supreme Court to declare when a trial court has issued a final judgment under state law is entitled to complete deference and cannot be reviewed by this court, it is "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," to conclude that the trial court's statement lacked sufficient indicia of finality as to constitute an "acquittal" on the first-degree murder charge. Based on my finding that the substance of the trial court's statement constituted an acquittal for double jeopardy purposes and because the Double Jeopardy Clause bars re-trial from a judgment of acquittal, I find that Petitioner's constitutional rights under the Fifth Amendment were violated by being twice placed in jeopardy for the same offense. Consequently, Petitioner's first-degree murder conviction and sentence cannot stand.

I therefore respectfully recommend that the petition for writ of habeas corpus be granted. As found by the Michigan Court of Appeals, the proper remedy under Michigan law is to remand for entry of a conviction of second-degree murder and for resentencing. *See Vincent*,

546 N.W.2d at 668 (citing *People v. Hoffmeister*, 394 Mich. 155, 161-162, 229 N.W.2d 305, 308-309 (1975)).

IV. CONCLUSION

For the reasons stated, I conclude that the Michigan Supreme Court's determination that Petitioner's constitutional right not to be subject to double jeopardy involved an unreasonable application of clearly established federal law, as established by Supreme Court precedent. Accordingly, I respectfully recommend that this petition for writ of habeas corpus be **GRANTED** and that this case be **REMANDED** for entry of a conviction of second-degree murder and for resentencing.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

In accordance with the provisions of Rule 6(b) of the Federal Rules of Civil Procedure, the court, in its

discretion, may enlarge the period of time in which to file objections to this report.

/s/ Marc L. Goldman
MARC L. GOLDMAN
UNITED STATES
MAGISTRATE JUDGE

Date: August 24, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUYONN ANDRE VINCENT,

Petitioner,

v.

KURT JONES,

Respondent.

_____/

CIVIL CASE NO. 98-40007

HONORABLE PAUL V. GADOLA U.S. DISTRICT JUDGE

ORDER OVERRULING RESPONDENT'S OBJECTIONS AND ACCEPTING MAGISTRATE JUDGE GOLDMAN'S REPORT AND RECOMMENDATION

(Filed Nov. 3, 2000)

Pursuant to 28 U.S.C. § 636(b)(1)(b), Rule 72(b) of the Federal Rules of Civil Procedure, and Local Rule 72.1(d)(2), the Court has reviewed Magistrate Judge Marc L. Goldman's report and recommendation filed August 24, 2000. Respondent filed his objections to that report and recommendation on September 11, 2000. Petitioner filed his response to Respondent's objections on September 19, 2000. After reviewing the record and the applicable law, this Court overrules Respondent's objections and accepts Magistrate Judge Goldman's report and recommendation as the Court's opinion.

First, Respondent objects that Magistrate Judge Goldman incorrectly concluded that whether the trial judge's statements of March 31, 1992 constituted an acquittal for Petitioner as to a charge of first-degree

murder was a question of law, not fact. (Resp. Brf. at 2.) Because, Respondent argues, that issue was a matter of fact, Magistrate Judge Goldman improperly failed to afford the Michigan Supreme Court's determination – that the trial judge's statements did not constitute an acquittal – the broad deference afforded by 28 U.S.C. § 2254(d)(2).

Respondent's objection is ill founded; Magistrate Judge Goldman was correct to treat this issue as a question of law, not fact. Magistrate Judge Goldman correctly noted that "the trial court's statements are not in dispute. Rather, it is the legal consequences of those statements which are in dispute." (Report and Recommendation at 17.) The legal impact of uncontroverted facts is a question of law. *See Martinez v. Nygaard*, 831 F.2d 822, 826 (9th Cir. 1987); *Colonial Refrigerated Trans., Inc. v. Mitchell*, 403 F.2d 541, 547 (5th Cir. 1968). It follows that Magistrate Judge Goldman did not owe the Michigan Supreme Court's determination that the trial court had not acquitted Petitioner the broad deference due to a determination of fact. The Court thus overrules Respondent's first objection.

Respondent's second objection is that Magistrate Judge Goldman improperly failed to consider cases in which courts have held a trial judge's ambiguous statements regarding acquittal not to constitute an acquittal. (Resp. Brf. at 3.) In support of this argument, Respondent cites *United States v. LoRusso*, 695 F.2d 45 (2d Cir. 1986), *Matter of Lionel F.*, 558 N.E.2d 30 (N.Y. 1990), *Robinson v. Clarke*, 939 F.2d 573 (8th Cir. 1991), and *United States v. Washington*, 48 F.3d 73 (2d Cir. 1995). Respondent cites to no specific page in any of these cases that would support his position, nor does he provide further elaboration as to why these cases militate in favor of his argument. The

Court is thus forced to do what Respondent should have done for himself; i.e., it must sift through these cases seeking support for Respondent's stance.

At first, *LoRusso* seems to buttress Respondent's argument. In that case, the Second Circuit reasoned that the trial court could amend promptly its oral decision granting a motion for judgment of acquittal because so doing would not subject the defendants to a second trial in violation of the Double Jeopardy Clause. *See LoRusso,* 695 F.2d at 54. Since that decision however, the Supreme Court has made clear that the Double Jeopardy Clause precludes review of an acquittal "not only when it might result in a second trial, but also if reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the element of the offense charged." *Smalis v. Pennsylvania,* 476 U.S. 140, 146 (1986) (internal quotation omitted).

Washington and *Lionel F.* do not aid Respondent because they are factually distinct. In *Washington,* the trial judge "exercised the earliest available opportunity – the adjournment for lunch – to reconsider and modify its order." *Washington,* 48 F.3d at 79. Almost precisely the same situation occurred in *Lionel F. See Lionel F.,* 558 N.E.2d at 31. It is at least colorable that in those cases the defendants were not subject to "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense" of which they had been acquitted; i.e., it could possibly be that the defendants in *Washington* and *Lionel F.* were subject to one uninterrupted proceeding relating to the charges of which the trial judge had momentarily acquitted them. *Smalis,* 476 U.S. at 146.

Here, however, the trial judge waited two days to reverse his granting of a directed verdict of acquittal as to the charge of first-degree murder, and did so after that directed verdict had been entered in the court's docket. (Report and Recommendation at 3.) At that point, further proceedings as to the count of first-degree murder ensued.

Robinson is inapposite because, in that case, the trial judge clearly had not issued an oral judgment of acquittal. *See Robinson,* 939 F.2d at 577. The four cases upon which Respondent relies for its second objection do not, in short, compel the result that Respondent seeks. The Court therefore overrules Respondent's second objection.

Respondent's third objection is that Magistrate Judge Goldman "failed to consider Respondent's argument that even if the trial judge had unambiguously granted Petitioner's motion for directed verdict, the court could consider the issue the next day, so long as the jury had not been informed of the directed verdict." (Resp. Brf. at 3.) Based on a review of the record and the applicable legal standard, this Court concludes that whether the jury knew of the directed verdict is irrelevant. What is dispositive is that Petitioner was subject to a further proceeding on the charge of first-degree murder after the trial judge had orally granted a directed verdict as to that charge. For this reason, the Court overrules Respondent's third objection.

Accordingly, this court being fully advised in the premises,

IT IS HEREBY ORDERED that Respondent's objections to the report and recommendation [docket entry 32] are **OVERRULED.**

IT IS FURTHER ORDERED that Magistrate Judge Goldman's report and recommendation of August 24, 2000 [docket entry 31] is **ACCEPTED** as the Court's opinion.

SO ORDERED.

Dated: 11/2/00

/s/ Paul V. Gadola
HONORABLE
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUYONN ANDRE VINCENT,

Petitioner,

v

KURT JONES,

Respondent.
_____/

CIVIL ACTION
NO: 98-40007

JUDGMENT

(Filed Nov. 3, 2000)

This court having entered an order accepting the Magistrate Judge's Report and Recommendation as the findings and conclusion of the court;

IT IS ORDERED AND ADJUDGED that judgment be entered for Petitioner, that the petition for writ of habeas corpus be Granted and that this case be Remanded for entry of a conviction of second-degree murder and for resentencing.

Dated: November 3, 2000

DAVID J. WEAVER, CLERK

By: /s/ Ruth A. Chopp
Ruth A. Chopp
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 8 2002
CLERK

NO. 02-524

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

KURT JONES,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION

STATE APPELLATE DEFENDER OFFICE

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Counsel for Respondent

25 pp

NO. 02-524

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

KURT JONES,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Duyonn Andre Vincent respectfully asks this Honorable Court for leave to proceed *in forma pauperis* so that he may file the accompanying Brief in Opposition to Petition for Writ of Certiorari with this Court.

Respondent had been found by the state trial court to be indigent for purposes of state appellate proceedings, was appointed counsel for that purpose, and is represented in this Court by that appointed counsel. As his affidavit indicates, Respondent is currently incarcerated in a state prison and is not receiving any income.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

DAVID A. MORAN
(Counsel of Record)
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Dated: October 8, 2002

Counsel for Respondent

NO. 02-524

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

KURT JONES,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Duyonn Andre Vincent, being first duly sworn, depose and say that I am the Respondent in the above-entitled case and that because of my poverty I am unable to pay the costs associated with defending in this Court the judgment of the United States Court of Appeals for the Sixth Circuit.

I further swear that the responses which I make below relating to my ability to pay the costs of defending this appeal are true:

1. Are you presently employed? NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2-2002 32.58 ~~week~~ Month/4

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

DUYONN ANDRE VINCENT

Subscribed and sworn to before me
this 10 day of Sep, 2002.

Angela L Curtis

Notary Public, _____ County, Michigan
My Commission Expires: _____

ANGELA L CURTIS
NOTARY PUBLIC GENESEE CO., MI
MY COMMISSION EXPIRES May 15, 2008
ACTING IN LAPEER COUNTY, MI

NO. 02-524

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

KURT JONES,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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Counsel for Respondent

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COUNTER-STATEMENT OF THE CASE

Proceedings in the State Trial Court

Respondent Duyonn Andre Vincent and two other men were tried together in the Genesee County (Michigan) Circuit Court on, among other counts, first-degree premeditated murder. After the prosecution's case concluded on March 31, 1992, all three defendants moved for a directed verdict on the first-degree murder charge on the ground that there was insufficient evidence of premeditation. The trial judge granted the directed verdict motion:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

Vincent v. Jones, 292 F.3d 506, 508 (6th Cir. 2002) (quoting trial judge) (3a).

The trial court's official docket entries for March 31, 1992, reflect the grant of the directed verdict and reduction of the charge to second-degree murder:

> MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER.

Id., 292 F.3d at 512 (quoting trial court docket entries) (12a).

The following day, April 1, 1992, the prosecutor renewed his argument against the grant of the directed verdict. After Respondent's attorney argued that the Double Jeopardy Clause would prohibit reconsideration of the grant of the directed verdict, the trial judge stated:

> Do you really believe that? You think that when a decision is made that before it's recited to the parties who are directly involved in it and particularly the jury because we're asking now for the jury to not consider certain factors that might be brought to them, that a Court cannot consider what it has done? I don't know that that's right. I, I consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not, I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.

Id., 292 F.3d at 508 (quoting trial judge) (4a).

After counsel for one of the codefendants joined in Respondent's double jeopardy argument, the judge responded:

> THE COURT: You think double jeopardy has anything to do with this?
>
> MS. CUMMINGS: Yes. I believe once you've directed. A verdict--
>
> THE COURT: Why is that?
>
> MS. CUMMINGS: A verdict that that's---
>
> THE COURT: I haven't directed a verdict to anybody.
>
> MS. CUMMINGS: You granted our motion.
>
> THE COURT: Oh, I granted a motion but I have not directed a verdict.

Id., 292 F.3d at 508-509 (quoting trial colloquy) (4a-5a). The trial court then took the matter under advisement.

On April 2, 1992, two days after granting the motion for directed verdict and one day after hearing Respondent testify and present his defense case, the trial court announced, "I've reconsidered the ruling that the Court earlier made and I've decided to let the jury make its own determination on the Degrees." *Id.*, 292 F.3d at 509 (quoting trial judge) (5a).

The next day, April 3, 1992, Respondent was convicted of first-degree premeditated murder. He was then sentenced to the mandatory term of life imprisonment without parole.

Proceedings on Direct Appeal

On his direct appeal of right, the Michigan Court of Appeals unanimously reversed Respondent's first-degree murder conviction and remanded to the trial court for entry of a second-degree murder conviction and a resentencing on that reduced charge. *People v. Vincent*, 546 N.W.2d 662 (Mich. Ct. App. 1996) (14a). The Michigan Court of Appeals explained that the trial court's decision to reverse itself and allow further factfinding on the first-degree murder count was contrary to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986):

> In *Smalis v. Pennsylvania*, the Supreme Court reiterated that a trial court's determination that the evidence is insufficient to convict is an acquittal under the Double Jeopardy Clause and that the Double Jeopardy Clause bars subjecting a defendant to post-acquittal fact-finding proceedings going to the guilt or innocence regarding such a charge. As explained below, we are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights.

Vincent, 546 N.W.2d at 665-666 (19a).

The Michigan Court of Appeals rejected the claim that Respondent had not been acquitted:

> We reject any suggestion that the trial court did not actually direct a verdict of acquittal as to the first-degree murder charge after hearing the arguments of counsel. While the court's words "Well, my impression at this time" may be somewhat ambiguous, the court's following statement: "What we have at the very best is second-degree murder," is not ambiguous. The next morning, the judge acknowledged he had granted the motions for directed verdict. In deciding to reserve ruling, the court referred to the "ruling" it had made earlier, and in submitting the first-degree murder charge to the jury, the court said it had reconsidered the "ruling" it had previously made.

Id., 546 N.W.2d at 667 (22a-23a).

The Michigan Court of Appeals therefore concluded that the trial court had violated Respondent's Double Jeopardy Clause rights by submitting the first-degree murder charge to the jury:

> The court made a ruling that it later reconsidered. However, once the court rendered its ruling on the record directing a verdict of acquittal on the first-degree murder charge, double jeopardy principles forbade it from changing its mind and allowing the jury to consider a first-degree murder charge. The court's reversal of its directed verdict resulted in further proceedings where the jury resolved factual issues going to the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge. *Smalis, supra.*

Id., 546 N.W.2d at 667 (23a).

The prosecution appealed to the Michigan Supreme Court, and that court reversed the decision of the Court of Appeals and reinstated Respondent's first-degree murder conviction by a vote of four to three. *People v. Vincent,* 565 N.W.2d 629 (Mich. 1997) (26a). The majority summarized its decision:

> We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

Id., 565 N.W.2d at 636 (42a)

In so holding, the majority relied heavily on *State v. Collins,* 771 P.2d 350 (Wash. 1989), for the proposition that:

> A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. This concept finds support in our court rules. [Mich. Court Rules] 2.602(A) requires that judgments and orders be "in writing, signed by the court and dated with the date they are signed." None of the indicia of formality associated with final judgments are present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all. "Okay" does not equate with "It is so ordered."

Vincent, 565 N.W.2d at 635 (40a).

In a footnote, the majority explained that "Factors that might be considered in evaluating finality, in addition to a clear statement in the record or a signed order, might also include an instruction to the jury that a charge or element of the charge has been dismissed by the judge *or that a docket entry has been made reflecting the trial court's action.*" *Id.*, 565 N.W.2d at 635

n. 9 (42a) (emphasis added). Nowhere did the majority acknowledge that a docket entry reflecting the trial judge's action had been made in this case.

Having concluded that the trial judge had not granted a directed verdict, the Michigan Supreme Court majority did not reach the Michigan Court of Appeals' holding that a trial judge cannot constitutionally reverse a grant of directed verdict later in the trial. However, the majority agreed, after a discussion of *Smalis*, that "characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions." *Id.*, 565 N.W.2d at 633 (35a).

Three justices dissented. The dissenters concluded that the decisions of this Court compelled the conclusion that the trial judge had actually terminated Respondent's jeopardy on the first-degree murder charge by granting the motion for a directed verdict. *Id.* 565 N.W.2d at 639 (Cavanagh, J., dissenting) (42a).

Respondent then filed a motion for reconsideration in the Michigan Supreme Court, pointing out that a docket entry had indeed been made reflecting the trial judge's decision to grant the directed verdict motion on the first-degree murder count. The Michigan Supreme Court denied reconsideration, *People v. Vincent*, 456 Mich. 1201 (1997), and this Court subsequently denied Respondent's petition for a writ of certiorari. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Proceedings On Habeas Corpus

Respondent then filed a timely petition for writ of habeas corpus in the district court. The district court granted the writ on November 3, 2000 (78a). The district court held that since

the trial judge's statements and orders were undisputed, the question of whether those statements and orders amounted to a grant of directed verdict was a legal question not subject to the presumption of correctness (79a). The district court next held that the lower court cases cited by Petitioner for the proposition that a judge is free to reverse himself after granting a directed verdict were factually and legally distinct from Respondent's case because further proceedings had not occurred before the reversals of oral grants of directed verdicts in those cases, while in this case a formal docket entry had been made, two days had passed, and further proceedings had occurred before the reversal (79a-81a). Accordingly, the district court granted the writ and ordered that Michigan reduce Respondent's conviction to second-degree murder and conduct a resentencing on that charge (83a).

Petitioner appealed that judgment to the United States Court of Appeals for the Sixth Circuit, which unanimously affirmed. *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002) (1a). Relying on this Court's decisions in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), and *Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986), the Sixth Circuit held that the question of whether the trial judge had acquitted Respondent was a question of law not subject to the presumption of correctness. *Vincent*, 292 F.3d at 510-511 (8a-10a). The Sixth Circuit next concluded that the trial judge's remarks clearly indicated that he had granted a directed verdict to Respondent on the first-degree murder court on March 31, 1992, and that the judge had formalized that grant by recording it in the official docket entries for that date. *Id.*, 292 F.3d at 511-512 (10a-12a).

On September 4, 2002, Justice Stevens granted Petitioner's application to file a petition for writ of certiorari more than 90 days after the Sixth Circuit's decision. On October 2, 2002, Petitioner filed the Petition for Writ of Certiorari in this Court.

ARGUMENT

I. The question of whether a trial court has granted a directed verdict for purposes of the Double Jeopardy Clause is a legal question not subject to the presumption of correctness, and the Sixth Circuit correctly concluded that the trial court had granted a directed verdict.

Petitioner first argues that the Sixth Circuit and the district court erred in refusing to defer to the Michigan Supreme Court's conclusion that the trial court had not granted a directed verdict to Respondent. Petition for Writ of Certiorari at 5-9. According to Petitioner, the Michigan Supreme Court's conclusion is a factual finding subject to the presumption of correctness on habeas corpus review.

Petitioner's argument is directly foreclosed by this Court's decisions in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). In *Smalis*, this Court rejected the prosecutor's claim that it was bound by the Pennsylvania Supreme Court's characterization of the trial judge's ruling in that case:

> [J]ust as "the trial judge's characterization of his own action cannot control the classification of the action under the Double Jeopardy Clause," *so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.*

Id., 476 U.S. at 144 n. 5 (emphasis added; internal brackets deleted; quoting *United States v. Scott*, 437 U.S. 82, 96 (1978)); *see also Martin Linen Supply*, 430 U.S. at 571 n. 9 ("The Court must inquire whether the ruling in (defendant's) favor was actually an 'acquittal' even though the District Court characterized it otherwise").

The question of whether the judge actually granted a directed verdict of acquittal for purposes of the Double Jeopardy Clause is manifestly not a "factual finding" subject to a

presumption of correctness. It is a legal question that the federal courts must review independent of the label that state courts have attached to the judge's action. *Smalis*, 476 U.S. at 144 n. 5. Petitioner cites no authority to the contrary, and there is none.

Petitioner does not actually argue in this Court the substantive question of whether the trial court did grant a directed verdict to Respondent on the first-degree murder count. In any event, the Sixth Circuit's conclusion that the trial court did grant a directed verdict is clearly correct and would still be correct even if the presumption of correctness did apply to the Michigan Supreme Court's decision.

On March 31, 1992, at the conclusion of the prosecution's case, the trial court specifically found that the prosecution had failed to prove premeditation and deliberation, essential element of first-degree premeditated murder and, therefore, the appropriate charge was second-degree murder. The trial court then recorded this grant of directed verdict in the court's official docket entries. The trial court itself later repeatedly referred to what it had done as "a ruling," and also explained that it had "granted a motion[.]" *See Vincent*, 292 F.3d at 512.

The Michigan Supreme Court's conclusion that none of this amounted to a grant of directed verdict was predicated on two erroneous beliefs. First, the Michigan Supreme Court reasoned that an oral acquittal not accompanied by a written order or some other formal trappings was insufficient to terminate jeopardy. *Vincent*, 565 N.W.2d at 635, 636 (38a-42a). This conclusion is, however, directly contrary to *United States v. Ball*, 163 U.S. 662, 671 (1896), in which this Court observed that "a verdict of acquittal, *although not followed by any judgment*, is a bar to a subsequent prosecution for the same offense." (Emphasis added).

Second, the Michigan Supreme Court expressly acknowledged that the formal trappings requirement it had just created for a grant of directed verdict could be satisfied if "*a docket entry has been made reflecting the trial court's action.*" *Vincent*, 565 N.W.2d at 635 n. 9 (42a) (emphasis added)). Inexplicably, however, the Michigan Supreme Court failed to acknowledge that precisely such a docket entry had been made in this case on March 31, 1992: "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER." *Vincent*, 292 F.3d at 512 (12a). Therefore, even under the criteria set forth by the Michigan Supreme Court, the trial judge in this case clearly granted a directed verdict to Respondent on the first-degree murder count.

II. The question of whether a trial court may reverse a grant of directed verdict later in the trial is not squarely presented by this case, the lower court cases cited by Petitioner are distinguishable, and this Court's decision in *Smalis* forecloses such an argument on the facts of this case.

Petitioner also presents a "right result, wrong reason" argument as to why habeas corpus should have been denied: even if the trial judge did grant a directed verdict, the judge was free to revisit that decision later in the trial. Petition for Writ of Certiorari at 9-13. This question was not squarely litigated during this habeas litigation because the only Michigan court to decide that question, the Michigan Court of Appeals, decided that question in Respondent's favor. *People v. Vincent*, 546 N.W.2d 662, 665-667 (Mich. Ct. App. 1996) (19a-22a). The Michigan Supreme Court did not reach this argument but indicated that it would have rejected it: "under federal precedent and our recent decision in *People v. Nix*, 556 N.W.2d 866 (Mich. 1996),

characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions." *People v. Vincent*, 565 N.W.2d 629, 633 (Mich. 1997) (34a-35a) (citing *Smalis v. Pennsylvania*, 476 U.S. 140 (1986)).

Since the final state court decision did not adopt Petitioner's alternative argument and instead indicated that it would have rejected it, the federal courts did not squarely review that argument. Instead, as required by 28 U.S.C. § 2254(d), the federal courts focused on whether the Michigan Supreme Court's decision that the trial court had not granted a directed verdict was contrary to, or an unreasonable application of, this Court's precedents. For this reason, this case amounts to an exceedingly poor vehicle to review Petitioner's alternative argument.

In any event, that argument has been properly rejected by every state and federal judge to consider it. Each of those judges rejected the argument because it is contrary to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), a decision which Petitioner neglects to cite in its Petition for Writ of Certiorari.

The Michigan Court of Appeals unanimously held, relying on *Smalis*, that "the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights." *Vincent*, 546 N.W.2d at 665-666 (19a). As discussed above, the Michigan Supreme Court majority did not directly reach this argument but, after citing and quoting *Smalis*, concluded that the trial judge could not reverse himself later in the trial if he had indeed granted a directed verdict. *Vincent*, 565 N.W.2d at 633 (34a-35a). Likewise, the district court cited *Smalis* to reject the claim that the trial judge is free to revisit a directed verdict grant later in the

trial (80a). Finally, the Sixth Circuit also relied on *Smalis* for this proposition. *Vincent*, 292 F.3d at 511 (9a).

Despite the fact that each court to consider Petitioner's argument has relied on *Smalis* to reject it, Petitioner does not even mention *Smalis*. Instead, Petitioner relies on several lower court decisions, but not one of those decisions applies or even cites *Smalis*, all of those decisions have obvious and important factual distinctions from this case and from *Smalis*, and most of those decisions do not actually support Petitioner's argument at all.

In *Smalis*, this Court unanimously held that after a grant of a directed verdict, the Double Jeopardy Clause *bars not only a new trial on the acquitted count but also a continuation of the same trial on that count*:

> The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U.S. at 308. *Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984).
>
> When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a post-acquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." [*United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977)].

Smalis, 476 U.S. at 145-146 (emphasis added; footnote and citation omitted).

It follows immediately from *Smalis* that a grant of directed verdict cannot be reversed later in the trial because that "reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Id.*; *see, e.g., United States v. Blount*, 34 F.3d 865, 868-869 (9th Cir. 1994) (oral grant of directed verdict terminated jeopardy so as to preclude court's reconsideration the following day); *Brooks v. State*, 827 S.W.2d 119, 121-123 (Ark. 1992) (oral grant of directed verdict terminated jeopardy and precluded later reconsideration); *Lowe v. State*, 744 P.2d 856, 856-858 (Kan. 1987) (jeopardy terminated with oral grant of directed verdict so as to preclude reconsideration next day); *State v. Blacknall*, 672 A.2d 1132 (N.J. 1996) (same).

Petitioner's argument completely ignores *Smalis* and, instead, claims the existence of a split of lower court authority. In order to establish this claimed split, Petitioner cites three circuit court cases, *United States v. LoRusso*, 695 F.2d 45 (2nd Cir. 1982), *United States v. Baggett*, 251 F.3d 1087 (6th Cir. 2001), and *United States v. Byrne*, 203 F.3d 671 (9th Cir. 2000), and one state supreme court decision, *State v. Iovino*, 524 A.2d 557 (R.I. 1987). However, each of these cases is obviously distinguishable from this case. Further, none of these cases applies or even cites *Smalis*.

In *LoRusso*, a case decided several years before *Smalis*, the trial court granted a directed verdict as to one count, and the prosecutor "immediately" moved to substitute a lesser-included count, a motion which was granted before any further proceedings occurred. 695 F.2d at 50-51. In rejecting the defendants' double jeopardy argument, the Second Circuit manifestly relied on the reasoning, subsequently discredited in *Smalis*, that double jeopardy is not offended so long as a second trial is not required:

> [W]e see no reason why the trial court in the present case was not free before the entry of judgment to amend its own ruling *since it did so without subjecting the defendants to a second trial*. . . . In the circumstances of this case, where the court's oral decision was followed promptly by the modification providing for the reduction instead of the elimination of count 2, and where the reduced count could be, and was, submitted in the normal course of the trial *to the original jury*, we conclude that the action of the trial court did not violate principles of double jeopardy.

LoRusso, 695 F.2d at 54 (emphasis added; footnote omitted). As the district court observed in rejecting *LoRusso*, that decision's reliance on the rationale that the directed verdict could be reversed or amended so long as a second trial would not result is contrary to *Smalis* (80a). *LoRusso* is also factually distinct from this case in that the judge in *LoRusso* immediately modified his order before further proceedings occurred, while the judge in this case waited for Respondent to testify and to present his entire case before reversing himself.

Petitioner also cites *Byrne*, but, like all of the other cases Petitioner cites, *Byrne* does not mention or even cite *Smalis*. Instead, *Byrne* relies on *LoRusso*, without any recognition that the reasoning of that case was squarely rejected in *Smalis*. Further, *Byrne* is factually distinguishable in that the prosecutor "immediately" moved for reconsideration, and the trial judge "made it clear that her ruling was not final in the course of the same colloquy in which she announced the decision. . . . Because the district judge made clear, in the same colloquy in which she issued her ruling on the motion for acquittal, that the motion was subject to reconsideration, the Double Jeopardy Clause was not violated." 203 F.3d at 673, 674-675. Unlike *Byrne*, there was no immediate motion for reconsideration, and the judge in this case did not indicate that his decision was subject to reconsideration until the next day.

Petitioner essentially admits that *Baggett* is distinguishable from this case because the Sixth Circuit specifically found that the trial judge in *Baggett* did not grant a directed verdict during the trial but instead reserved decision until after the verdict. It is clear in this case, by contrast, that the judge in this case did not reserve his decision. In *Iovino*, the Rhode Island Supreme Court held that a trial judge could revisit his grant of directed verdict, but did not discuss or even cite *Smalis*.

What further distinguishes this case from all of the cases cited by Petitioner is that the trial judge in each of those cases made purely oral statements during the trial suggesting that an acquittal was appropriate. While an oral acquittal, "although not followed by any judgment," is sufficient for Double Jeopardy Clause purposes to preclude later reversal and reconsideration, *Ball*, 163 U.S. at 671, all of the cases certainly recognize that jeopardy terminates when the oral grant is reduced to writing. In this case, of course, the trial judge did reduce his grant of directed verdict to writing by recording it in the formal docket entries for March 31, 1992.

Petitioner's failure to discuss the effect of this docket entry is telling. Petitioner does not and cannot cite any cases in which such a directed verdict was formally granted and recorded but later reversed after further trial proceedings had been held. Petitioner cannot cite any such cases because such a procedure would obviously violate *Smalis*.

In short, there is no split of authority relevant to the facts of this case. The district court and the Sixth Circuit were correct to conclude that Respondent's jeopardy on the first-degree murder count terminated when the trial court granted a directed verdict on that count on March 31, 1992, and that the trial court therefore violated Respondent's Double Jeopardy Clause rights by revoking that grant two days later after Respondent had testified and presented his case.

CONCLUSION

Therefore, Respondent Duyonn Andre Vincent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: October 8, 2002

Supreme Court U.S.
FILED
FEB 18 2003
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002
No. 02-524

KURT JONES, WARDEN.
Petitioner.

vs.

DUYONN ANDRE VINCENT.
Respondent.

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF
WAYNE COUNTY PROSECUTING ATTORNEY
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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STATEMENT OF THE QUESTION

I.

Do principles of double jeopardy bar reconsideration by the trial judge of the granting of a motion for directed verdict of acquittal, where the jury has not been discharged or informed of the granting of the motion, so that the result of the reconsideration of the motion by the trial judge is that the trial simply continues on before the same jury?

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Interest of the Amicus

Amicus is the Prosecuting Attorney for Wayne County, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. Amicus, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it will directly affect the execution of his constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

Statement of Material Facts and Proceedings

Amicus concurs with the statement by the Petitioner.

Argument

A. Introduction

(1) Factual Background

One thing is clear in this case: no defense wish to have this case determined by the jury was thwarted, the defense seeking to avoid a jury resolution of the premeditation element. Nor was any interest protected by the double jeopardy clause compromised by simply *continuing* the trial before the same tribunal as it would had the trial judge simply denied the motion in the first instance. There is also no question that there was no attempt to harass the defendant through repeated prosecutions, as all the prosecution sought was one full and fair opportunity to have the case decided by the jury impaneled to hear the case.

At the close of the prosecution's proofs in this case defense counsel moved for a directed verdict on the first degree murder charge, arguing a lack of premeditation. The result of the granting of the motion would limit the jury's consideration to a maximum charge of second-degree murder. The trial judge granted the motion. The next morning, after argument from the prosecution, the trial court reconsidered its decision. It noted that it had neither informed the jury of its previous ruling nor discharged it from consideration of the first degree murder case, and, in fact, had simply "granted a motion," but had not "directed a verdict" in that the charge had not been withdrawn from the jury. Based on cases from other jurisdictions, the Court of Appeals held that because the reconsideration of the ruling by the trial judge "resulted in further proceedings" directed to the first degree murder charge, jeopardy barred the actions of the trial judge. That the "further proceedings" were the continuation of the *very same trial*, from which the jury had not been discharged, which was *not* the case in any of the cases from this Court on which the "judicial acquittal" doctrine was established, received no note

from the court. In fact, the point is critical. To ignore it removes jeopardy law from its moorings, and is neither necessary nor even relevant to the protection provided by the clause against government oppression by repeated attempts to convict the accused. It is the People of the State, in whose name prosecutions are brought, who are oppressed and aggrieved when jeopardy is viewed as barring reconsideration of the decision on a motion for directed verdict when the jury has not been discharged, and nothing in the decisions of the this Court requires this decidedly odd result.

The Michigan Supreme Court reversed the Court of Appeals. That court found that respondent's double jeopardy protection had not been violated because the trial judge's "inchoate impressions did not mature into a final judgment of acquittal of the charge." The trial judge had stated when ruling that it was his "impression at this time" that premeditation had not been shown, so that "I think that Second Degree Murder is an appropriate charge as to the defendants." The federal district court, however, granted a writ of habeas corpus, disagreeing with the Michigan Supreme Court as to the legal effect of the trial court's statement of "impressions." The Sixth Circuit then affirmed, relying on the fact that the clerk had entered the ruling on the docket sheet. Finding that the trial court had granted a directed verdict, the panel then quickly concluded that the trial judge "was not entitled to reverse that decision later in the trial. It is irrelevant whether the trial judge had informed the jury of his decision....the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause." *Vincent v Jones*, 292 F3d 506, 512 (CA 6, 2002). The federal courts have erred.

(2) The Legal Issues, and the Approach of the Amicus

The holding of the Court of Appeals precludes a judge from correcting an erroneous decision on a motion for

directed verdict even *moments* after made, upon a discovery of clear error, and before discharge of the jury. No principle served by the jeopardy clause is served by such a result.

It will be the position of amicus that, so long as the jury is not discharged, even a "true" directed verdict of acquittal (that is, one which actually goes to an element of the offense) may be reconsidered by the trial judge, as if the judge changes his or her mind, the result is simply the continuation of the existing jeopardy, and not a second or successive (or multiple) jeopardy at all. Along the way, amicus will make observations regarding the way "things ought to be"; that is, that the granting of a motion for directed verdict should be understood not as an acquittal, but as a *ruling law* that no rational factfinder could find guilt beyond a reasonable doubt, which is either correct or not, and should be subject to appellate review not only if denied, but if granted. Jeopardy principles are not offended by a second trial if the ruling is found to be incorrect, for the first trial is terminated *at the request of the defendant, in making the motion*. Retrial should be permitted in this circumstance.[1] A directed verdict of acquittal entered by a judge in a jury trial is not a "true acquittal," but is rather a ruling of law. No interest historically protected by the jeopardy clause is offended by review of that decision, or by a second trial on a finding of error committed by the trial judge.

---

1. As will be seen, this Court has itself noted on a number of occasions that the law of double jeopardy is and has been in a state of "confusion," with its decisions far from "models of consistency and clarity." See *Burks v United States*, 437 US 1, 98 S Ct 2141, 57 L Ed 2d 1 (1978).

B. The Interests Protected By The Jeopardy Clause: A Brief Look At History

Given that the Fifth Amendment to the federal constitution provides, in terms that admit of no exceptions, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...," the question arises as to the justification for *ever* allowing retrials for any reason. The answers must be found in history, logic, and sound policy, for as Justice Holmes, writing for the Court in *Gompers v United States*, 233 US 604, 58 L Ed 1115, 34 S Ct 693 (1914), observed long ago, "the provisions of the Constitution are not mathematical formulas...; they are organic, living institutions transplanted from English soil....(whose significance and scope must be determined) not by simply taking the words and a dictionary, but by considering their origin and the line of their growth."

(1) The Prohibition On Retrial After Acquittal or Conviction

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of autrefois acquit and autrefois convict. Blackstone stated that

> ...the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once ***fairly*** found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime (emphasis added).

4 Blackstone Commentaries 335.[2]

Blackstone also observed that the:

> plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime....

4 Blackstone's Commentaries at 329-331.

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal." See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

This tradition of the pleas in bar of autrefois acquit and autrefois convict, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists, see e.g. the Massachusetts Body of Liberties of 1641. New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." N.H. Const, art I, sec. 16 (1784). Courts in other states also recognized this form of plea in bar. See 26 Am Crim L Rev at 1480-1481.

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2. As well as autrefois attaint, or corruption of the blood, which has long since been obsolete.

This rich history was thus before the First Congress which proposed the Bill of rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or *one trial* for the same offence...."(emphasis added). 1 Annals of Cong 434. The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial *even where sought by the defendant* on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment jeopardy clause, referring, significantly, to *one jeopardy*, rather than *one trial*.

Thus, our jeopardy clause is an amalgam of common law pleas in bar, which required an actual judgment in a prior proceeding before the bar could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double jeopardy clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him*" (emphasis added). Story, 3 *Commentaries on the Constitution*, (1833) sec 1781, p. 659. The historical underpinning of the jeopardy protection, then, with regard to acquittals, is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v United States*, 355 US 184, 78 S Ct 221, 2 L Ed 2d 199 (1957). The law of jeopardy with regard to prosecutions after

an acquittal has continued to develop, and amicus will turn to the modern development of the "acquittal" doctrine shortly.

(2) The "Valued Right to Have the Trial Completed By A Particular Tribunal"

Because it is the acquittal doctrine which forms the heart of this case, amicus will not tarry long regarding the jeopardy interests involved in mistrials; that is, terminations of the trial before verdict, and *against the will* of the defendant. The doctrine requires a termination against the will of the defendant, for consent to termination of the trial without a verdict is consent to a second trial, whether that consent be premised on a claim of some error occurring in the proceedings, or upon some claimed legal bar to the proceedings (such as a midtrial claim of a violation of speedy trial, or double jeopardy, or a defective information). See *United States v Scott*, 437 US 82, 98 S Ct 2187, 57 L Ed 2d 65 (1978).

It quickly became clear in our jurisprudential history that the jeopardy clause does not bar retrials after a termination of the first trial absent the defendant's consent and before verdict in at least some circumstances. In *United States v Perez*, 22 US 579; 6 L Ed 165 (1824) the Court held that a retrial was permitted following a mistrial occasioned by a failure of the jury to reach a verdict, as "the prisoner has not been convicted or acquitted, and may again be put upon his defense." The pleas in bar of autrefois acquit and autrefois convict were simply unavailable absent a conviction or acquittal. *Perez* has held the day throughout this country for these last 179 years. Further, in *United States v Ball*, 163 US 662-671, 41 L Ed 300-303, 16 S Ct 1192 (1895) it was held that a second trial was permissible after a conviction had been set aside (and that retrial was barred by an acquittal for a codefendant, at least where that acquittal had not been

overturned on appeal). The doctrine of *Perez* has also been applied to situations where the trial did not proceed to verdict for reasons other than the failure of the jury to agree, upon a finding of manifest necessity. See e.g. *Wade v Hunter*, 336 US 684, 93 L Ed 974, 69 S Ct 834 (1949).

Properly and historically understood, however, the double jeopardy clause actually encompasses no right to a determination of the matter before a particular tribunal, for, as Justice Story said, the double jeopardy protection is only triggered by a prior adjudication of guilt or innocence. The right to a determination of guilt or innocence by the particular jury existed in England as a *separate* doctrine from the pleas in bar, see 3 Coke, *Institutes* 110 (6th Ed, 1681), and the violation of this principle of jury practice could not be pled as a bar to a subsequent action, it being more a matter of discretion for the court. See Kirk, "'Jeopardy' During the Period of the Year Books," 82 U Pa L Rev 602, 611 (1934). Justice Powell has consequently expressed the view that an abusive termination of the trial prior to verdict should be considered under the rubric of due process, rather than under more stringent jeopardy principles. See *Crist v Bretz*, 437 US 28, 98 S Ct 2156, 57 L Ed 2d 24 (1978), Justice Powell, dissenting.

In any event, in this case the defendant plainly *did not want the case adjudicated by the jury*, and having moved for a prohibition on a jury verdict by the judge by way of a motion for a directed verdict of acquittal, cannot be heard to complain that the valued right to a determination of this matter by that tribunal was violated, a notion which makes no sense given that the trial *did* proceed before the same tribunal.

C. Reconsideration of Directed Verdicts of Acquittal Prior to Discharge of the Jury

With these jeopardy interests in mind, amicus will discuss the question of reconsideration of a directed verdict of acquittal by the trial court prior to the discharge of the jury. First, however, it is necessary to trace quickly the development of the doctrine of "judicial acquittals" in jury cases.

(1) What Is An Acquittal? From Kepner To Fong Foo Through Martin Linen Supply and Sanabria

That the prosecution cannot appeal an acquittal *by the factfinder* in the case was first established in *Kepner v United States*, 195 US 100, 49 L Ed 114, 24 S Ct 797 (1903), where the majority of the Court held that jeopardy precluded a retrial after acquittal, even where the acquittal was the result of error as against the People in the trial of the case. Though this may seem indisputable now, a cogent dissent was registered by Justice Oliver Wendell Holmes. In his characteristically laconic style, Justice Holmes supplied a consistent and logical answer to the question of why and when retrials are permitted. Observing that a defendant might be retried if the jury disagreed as to a verdict, that a defendant might be retried if a conviction was set aside on the prisoner's exceptions, and that the defendant might be retried on a new indictment if the judgment on the first was arrested upon motion, Justice Holmes stated his operating thesis:

> ...it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often that he may be tried. *The jeopardy is one continuing jeopardy, from its beginning to the end of the cause*. Everybody agrees that the principle in its origin was a rule forbidding a

> trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case (emphasis added). 49 L Ed at 126.

The issue before the Court in *Kepner* was whether a retrial was possible following the setting aside of an acquittal due to error occurring at trial as against the People. Justice Holmes would have held that retrial was *permissible*, as the defendant "no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial." 49 L Ed at 127. Justice Holmes dismissed the argument that a retrial following reversal was permissible upon a theory of waiver, remarking that "it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." 49 L Ed at 127. The logical conclusion, wrote Justice Holmes, is that the "necessary alternative is that the Constitution permits a second trial in the same case....The reason, I submit, is that there can be but one jeopardy in one case." 49 L Ed at 127.

The logic of Justice Holmes is unassailable, and his theory of continuing jeopardy provides a cogent explanation for retrials. There are no "exceptions" to the double jeopardy command; rather, jeopardy is simply not offended by retrials where the case is not truly concluded, there being "but one jeopardy in one case." This "continuing jeopardy" rationale has much to commend it.

The development of the modern doctrine of "judicial acquittals" began with *Fong Foo v United States*, 369 US 141, 82 S Ct 671, 7 L Ed 2d 629 (1962). There a corporation and two of its employees were brought to trial for conspiracy, as

well as a substantive offense. After seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all defendants, and a formal judgment of acquittal was entered. The trial judge's action was based on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. The United States Supreme Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the verdict of acquittal was "final and could not be reviewed." In its per curium opinion, which stretches to amount to a page and one half, the Court reached this conclusion without any analysis of whether a "judgment of acquittal" either entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protections of the double jeopardy clause as the scope and purpose of that clause are revealed in history. In short, the Court begged the question critical to the inquiry. But it is, for present purposes, important to note the context of the ruling: the jury had been *discharged*, and a successful appeal required not simply *further proceedings in the same trial*, but a *second trial*.

Fong Foo was followed in *United States v Martin Linen Supply*, 430 US 564, 97 S Ct 1349, 51 L Ed 2d 642 (1977). A judgment of acquittal was entered on defense motion after the jury had been discharged because of an inability to agree. Focusing on the jeopardy interest against the prevention of "multiple trials," 51 L Ed 2d at 649, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result in "another trial." 51 L Ed 2d at 650. Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then

determined is defined as "a resolution, correct or not, of some or all of the *factual elements* of the offense charged," in the context of a "judicial acquittal."

The rationale was similar in *Sanabria v United States*, 437 US 54, 98 S Ct 2170, 57 L Ed 2d 43 (1978). After all sides had rested, the trial judge excluded evidence in the case on the ground that the Government had cited the wrong underlying state statute in its indictment, and in the absence of any other evidence of guilt, then, on defendant's motion, entered a "judgment of acquittal." The Government appealed, pointing out that a technical defect in the indictment was correctable under the Federal Rules of Criminal Procedure. The First Circuit held that the proceedings had terminated on grounds *unrelated* to criminal liability of the defendant; the Supreme Court, while agreeing that a dismissal on grounds unrelated to criminal culpability is not even a "judicial acquittal" under *Martin Linen Supply*, held that what had occurred was not a dismissal, but an evidentiary ruling, followed by a judicial acquittal, which, under *Martin Linen Supply*, "however erroneous, bars further prosecution on any aspect" of the case. While a defendant seeking a midtrial termination of the proceedings on a "legal" ground thus takes "the risk that an appellate court will reverse the trial court," see *United States v Scott*, supra, a defendant who seeks a termination of the trial prior to verdict by seeking a "judicial acquittal" does *not* take the risk that an appellate court will reverse the trial court, said the Court. Why this is so or how any interest protected by the jeopardy clause is served by such a distinction was not explained, nor, amicus submits, is it explainable. But, again, with regard to the instant case, the context of the Court's holding is critical: the jury was discharged by the trial court, and a successful appeal thus required not simply "further proceedings" (i.e. in the same trial), but a *second* trial.

In sum, then, the "judicial acquittal" rule, as explained by this Court, does not bar any "further proceedings" after a

judicial acquittal, as assumed by the Court of Appeals here, but a *second trial*. Nothing in logic compels the result that a judicial decision on a motion for directed verdict cannot be revisited and the *first* trial continued even under existing jeopardy doctrine, nor is any interest protected by the jeopardy clause served by such a rule, which prevents a trial judge from reconsidering his or her decision even *seconds* after made, on an erroneous basis, and before the jury has been discharged or even informed of the court's decision. Nothing compels a rule that, at least in this context, places "in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals" when a jury trial is being had. See Justice Brown, dissenting in *Kepner*, 49 L Ed at 128.

(2) Review of A Judicial Acquittal In A Jury Case Prior to Discharge of the Jury

Amicus submits that disallowing review of a judicial acquittal in a jury case (aside from the view of the amicus, set forth below, that "judicial acquittals" on defense motion should not bar appeal and retrial in any event) when the jury has not been discharged, so that a reconsideration by the trial judge or reversal by an appellate court results in continuation of the original trial, cuts *Fong Foo*, *Martin Linen Supply*, and *Sanabria* loose from their juridical moorings, and is bad policy which the constitution does not require. Further, there is case law to the contrary, which the Court of Appeals opinion did not cite.

This case is a vivid demonstration of a phrase being wrenched from its constitutional moorings and given talismanic properties. Typical of cases making this same error is *People v Strong*, 472 NE2d 1152 (Ill App, 1984). At the close of the State's case the defense moved for a directed verdict on a home invasion charge, which was only one count, the defense arguing that the State had failed to prove that the

defendants had entered the residence without authority. The motion was granted. The next day, on motion of the State, the court rescinded its order, determining that there was sufficient evidence on the authority question for the jury to decide it. The defendants were convicted. The Illinois Court of Appeals agreed that the original granting of the directed verdict was erroneous. 472 NE2d at 1155. The court, however, held that the directed verdict was final despite the fact that the jury had not been discharged, because "further proceedings" were required after it was set aside, although they were not only a part of the same "jeopardy," but the very same trial. The court did not explain how any case from the United States Supreme Court required this result; none does.

A contrary result was reached in *People v District Court for the Seventeenth District*, 663 P2d 616 (Colo, 1983), on facts virtually indistinguishable from those in *Strong*. The defendant was tried for sexual assault in the first degree, first degree burglary, and the commission of a crime of violence. At the close of the prosecutions proofs the defense moved for a judgment of acquittal, which was granted on the greater inclusive offenses of sexual assault in the first degree, burglary in the first degree, as well as the crime of violence charge, the court ruling it would submit lesser included offenses to the jury. The next morning the court announced that it had made a mistake in granting the motion as to the sexual assault in the first degree assault charge. The defendant was convicted. When the verdicts were set aside for other reasons, defendant moved to dismiss the sexual assault in the first degree charge on grounds of double jeopardy, arguing that the trial judge could not set aside its erroneous verdict of acquittal.

The Colorado Supreme Court disagreed, correctly observing that the concern of the federal jeopardy clause, as explicated in *Martin Linen Supply*, was *multiple trials for the same crime*. 663 P2d at 619. But Colorado has a more expansive view of jeopardy under its own state constitution

and precludes retrial even after an erroneous midtrial dismissal on legal grounds, thus granting greater protection than does the federal jeopardy clause. Nonetheless, that right was not abridged, held the court, because *there was no second trial*, and thus there *was no multiple prosecution*. As the court cogently declared:

> It is quite obvious that the respondent court's mid-trial correction of its erroneous ruling on a motion for a judgment of acquittal did not impair the primary interest which the Double Jeopardy Clause seeks to accommodate--the elimination of the threat of multiple trials for the same offense....The corrective ruling, in other words, did not result in any additional governmental attempt to convict Conley before a different jury or undermine in the least Conley's interest in having his trial completed by the particular jury impaneled and sworn to resolve the controversy.
>
> 663 P2d at 621.

Unlike the Colorado Supreme Court, the Court of Appeals in the instant case failed to tie the jeopardy analysis to the interest protected by the jeopardy clause.

A second case avoiding the error committed by the Court of Appeals here is *State v Iovino*, 524 A2d 556 (RI, 1987). Again the trial judge reduced charges on a motion for a directed verdict of acquittal, the trial to continue on lesser included charges, and again, without any discharge of the jury, and without the jury having been informed of the directed verdict, the trial judge reconsidered and allowed the trial to go forward on the original charges. The Rhode Island Supreme Court agreed that the original reduction of charges by way of a directed verdict on the greater offense was erroneous; indeed, the defendant did not argue the point,

arguing only that "principles of double jeopardy mandate(d) that the decision, once made, could not be reconsidered." 524 A2d at 558. The court reviewed *Martin Linen Supply* and determined that the lynchpin of the decision was that the jeopardy is offended when the jury has been discharged after a directed verdict, thus requiring a second trial. As the court put it, "The nub of the distinction between this case and *Martin Linen Supply Co.*, lies in the fact that the reconsideration in this case had no effect on the continuance of the trial in which it was made" so that "the defendant was not faced with any threat of reprosecution beyond the jury already assembled to hear his case." 524 A2d at 559.

A federal circuit has also reached a contrary result. In *United States v Washington*, 48 F3d 73 (CA 2, 1995) the trial judge orally granted defendant's motion for acquittal as to a count at the close of the prosecution's case. The trial continued, and the trial judge, who had expressly declined to inform the jury of the dismissal of the charge, reviewed the matter and reversed his prior "grant of acquittal." The second circuit held that "an oral grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify...prior to the entry of judgment.'...Such conduct did not subject (defendant) to a 'second trial' or 'successive prosecution.' 48 F3d at 79. The present case is not distinguishable.

(3) Conclusion

The historical underpinnings of the jeopardy clause that amicus has very briefly sketched reveal that no interest protected by the jeopardy clause is served by disallowing reconsideration of the granting of a motion for directed verdict of acquittal prior to the discharge of the jury. Continuing the trial as before the ruling does not result in "repeated attempts" to "harass" and "oppress" the accused, but vindicates the State's interest in a full and fair opportunity to obtain a true verdict from the jury. Those cases from this

Court delineating the current "judicial acquittal" doctrine all involve the discharge of the jury, and thus do not support the result of the Court of Appeals here.

D. A Judicial Acquittal, Sought By The Defendant, Should Be Appealable, and A Retrial Permitted Upon A Finding of Error

Moreover, a directed verdict of acquittal is not a "true" acquittal. Where such a ruling of law is sought by the defendant, who thereby voluntarily relinquishes his or her right to a jury verdict, that ruling should be reviewable for legal error. If legal error is found, a second trial should be permitted..

As a matter of history the development of jeopardy principles did not initially include any power of the court to take a case from the jury and enter a verdict of acquittal, as no such authority existed. As that authority developed, initially it was not an authority to take the case from the jury, but rather to *instruct* the jury that its duty was to acquit, the verdict still being delivered by the jury. The jury might disregard such an instruction, and, if it did so, the verdict was subject to reversal-but, of course, on appeal the Government could oppose on the ground that the instruction was unwarranted given the evidence. As the authority to actually direct the jury to a verdict of acquittal evolved to become authority for the court to take the case from the jury before deliberation and verdict, it was characterized as a ruling of *law* that there was no evidence on an element or elements (now, that no reasonable jury could find guilt beyond a reasonable doubt given the proofs). The judge must take the evidence in the light most favorable to the prosecution, taking that evidence as true, and drawing all inferences reasonably inferable in favor of guilt. See "Directions for Directed Verdicts: A Compass for Federal Courts," 55 Minn L Rev 903 (1971); Henderson, "The Background of the Seventh Amendment," 80 Harv L Rev 289 (1966), Westen and Drubel,

"Toward A General Theory of Double Jeopardy," 1978 Sup Ct Rev 81 (1978); "Power and duty of court to direct or advise acquittal in criminal case for insufficiency of evidence," 17 ALR 910.

Westen and Drubel, in "Toward A General Theory of Double Jeopardy," take the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by hypothesis, it does not depend on an assessment of credibility or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a defendant's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be reviewed." Westen and Drubel, at 155.

Amicus submits that the protections served by the jeopardy clause, as well as the public interest, would be served by a rule that permitted a review of a directed verdict of acquittal for legal error and a second trial if error were found, as there be no harassment of the accused, who *sought* the termination of the trial, and the public interest in the conviction of the guilty would be vindicated. As said by Justice Brown, dissenting in *Kepner*, neither the jeopardy protection nor sound policy justify placing "in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals" when a jury trial is being had.

E. Conclusion

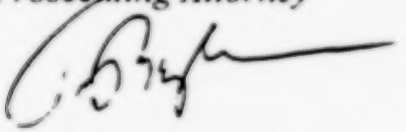
Amicus thus submits that *this* court, in view of the historical development of the jeopardy protection and its

mission, should hold that a directed verdict of acquittal may be reconsidered by a trial court prior to discharge of the jury, and the trial then continued if legal error is found. Finally, amicus submits that, though this court may not reach this result, the law and the public would be better served, if the jeopardy clause were understood to require that a directed verdict of acquittal be evaluated as a ruling of law, reviewable for legal error. On a finding of legal error by the trial court, a second trial would be allowed, thus avoiding the immunizing of a defendant who in truth and reality has never received an actual verdict as to guilt or innocence.

RELIEF

WHEREFORE, this Court should reverse the holding of the Sixth Circuit Court of Appeals.

MICHAEL E. DUGGAN
Wayne County
Prosecuting Attorney



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(5)

Supreme Court, U.S.
FILED
FEB 21 2003
OFFICE OF THE CLERK

No. 02-524

In The
Supreme Court of the United States

JANETTE PRICE,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 4, 2002
Certiorari Granted January 10, 2003

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RELEVANT DOCKET ENTRIES

GENESEE COUNTY CIRCUIT COURT

* * *

03/31/92 TRIAL BY JURY CONTINUED JURIES HERETOFORE EMPANELLED RETURNED AND HEARD FURTHER PROOF AND ALLEGATIONS IN PART. MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER. CT: II FEL. FIREARM STAY THE SAME. MOTION BY C. ODETTE TO HAVE MARCUS HOPKINS & D. VINCENT JURY REMOVED FROM COURT ROOM WHILE D. PERKINS IS ON TRIAL AND VICE VERSA. MTN GRANT ED. COURT EXCUSED BOTH JURIES DEFT PERKINS JURY TO RETURN TOMORROW MORNING @ 8:30 A.M. AND DEFTS VINCENT & HOPKINGS [sic] TO RETURN TOMORROW @ 10:00

04/01/92 TRIAL BY JURY CONTINUED FURTHER PROOFS AND ALLEGATIONS HEARD IN PART. TRIAL ADJ. UNTIL TOMORROW MORNING JP 1

04/02/92 TRIAL BY JURY CONTINUED FURTHER PROOFS & ALLEGATIONS HEARD IN FULL. ARGUMENTS OF COUNSEL. TRIAL ADJ. UNTIL TOMORROW MORNING. JP 1

04/03/92 VERDICT FORM FILED. (VINCENT) TRIAL BY JURY CONTINUED FREEMAN, VINCENT, HOPKINS JURY RETURNED & HEARD THE CHARGE OF THE COURT. JURORS F-2343 J. WOLFE, D-2258 D. DOUGLAS, EXCUSED FROM FURTHER DELIBERATION. VERDICT OF THE JURY AS TO MARCUS HOPKINS CT. I

VOLUNTARY MANSLAUGHTER, CT. II GUILTY FELONY FIREARM. AS TO DEFT. DWYONN VINCENT. CT. I GUILTY MURDER 1ST DEGREE. CT, II GUILTY FELONY FIREARM. SENT. DEF. TO MAY 13, 92 @ 2:30 P.M. BOTH DEFTS. REMANDED. JP1

* * *

PEOPLE OF THE STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

DUYONN ANDRE VINCENT,

Defendant.

File No. 91 45890 FC

(Filed March 31, 1992)

VOLUME IV

BEFORE THE HONORABLE DONALD R. FREEMAN,

CIRCUIT JUDGE

FLINT, MICHIGAN – TUESDAY, MARCH 31, 1992

APPEARANCES:

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Transcribed by:
Victoria J. Hunt, CSR 2251
Diane Baker, CER 5276

* * *

[106] we're going to do this without Carol Horvath.

THE COURT: Yes, that's what they're saying.

MR. STAMOS: Which, I think it's the easiest way to do it. I would just like the juries made aware that what I read into the evidence was the preliminary examination and can be used as substantive evidence.

THE COURT: You need nothing else to be presented to the jury then at this point?

MR. STAMOS: No, –

THE COURT: You're willing to close?

MR. STAMOS: Yes.

THE COURT: All right. Okay, I'll tell the jury. I'll tell them at the appropriate time when we have the instructions. Okay?

All right, now we're, have you settled everything for the time being?

MR. STAMOS: I think we have.

THE COURT: So I can go on to your motions? I'll be happy to listen to your motions if you please.

MR. ODETTE: Your Honor, with respect to Mr. Vincent I would ask the Court to take into consideration a

motion for directed verdict as to the charge of First Degree Murder. I would submit that the evidence looking at it in a light even most favorably to the prosecution has failed to sustain the elements of premeditation and [107] deliberation. The evidence would suggest that Mr. Vincent went to the highschool, did not go there with the express purpose of committing a crime of taking life. There's no evidence to suggest in any event that this was a thought out in advance action, even if you accept Mr. Stamos's proposition that he went to the car or went into the car with the intention to shoot one of the people who were present there. The evidence all suggests this was a spontaneous situation. There's, it all happened quickly, every single evidence is, every single witness has indicated that. Deliberation is an essential element to First Degree Murder. Deliberation requires that there be some indication that the defendant or the accused have the time of the shooting consider the pros and cons of his action, carefully considered the act, what he was doing. And I would suggest from this record that that element and premeditation are not present and would request the Court direct out on the. . .

THE COURT: You want to wait for the ambulance to go by please? Okay, you can proceed if you like.

MR. ODETTE: I would ask that the Court direct out the, permit the case to go to the jury on the crime of Second Degree Murder and any other lesser included offenses that would be appropriate to that but that the [108] Court enter a directed verdict on behalf of Mr. Vincent as to the First Degree Murder. Thank you.

THE COURT: Okay. Around the table if you like.

MS. CUMMINGS Your Honor, on behalf of Marcus Hopkins I make directed verdicts on the following arguments that the same logic Mr. Odette has presented on behalf of Mr. Vincent. Certainly it applies to Mr. Hopkins. There's nothing in the testimony to indicate that he had any intention. Or first of all there's nothing in any testimony that while at Hamady High School he possessed or shot any of the weapons that have been discussed. And the prosecutor to, to draw him in on that would have to indicate through some evidence that he shared some first degree intent. And that hasn't been demonstrated to the Court so I'd request that first degree be directed out.

As to the Count on the weapon I believe there's been no showing that while at Hamady High School he possessed a firearm. The only thing that you now have allowed in through those preliminary exam statements is Gill's testimony there that Marcus Hopkins said to Vincent "where are the bullets". That's the only statement he makes that's in evidence in this case regarding to bullets, guns. And at the time of the offense, at the time of the shooting, the murder, the claim of murder that he had [109] anything to do with that. He, he simply was present. My argument stands on the, the legal rationale of mere presence that doesn't bring him into the realm of evil companions unless he shares their same thought. I think that that hasn't been demonstrated so specifically I would like first degree out and, and secondarily I would like the firearm Count directed out.

THE COURT: Okay. Counsel?

MR. DOLL: Your Honor, with respect to my motion for directed verdict of acquittal. It's primarily directed at the charge of First Degree Murder and cocounsel

correctly stated that the element of premeditation on behalf of Mr. Perkins is missing in this matter.

In his case there's no preparation, there's no deliberation on his part. In fact the testimony shows that he didn't even get into the automobile which contained the person that did the shooting in this case until approximately five minutes before the actual shooting took place in the Hamady Brothers parking lot. There's no testimony that he was involved in getting the guns, other then the testimony of Derrick Gill. There's no testimony that he was getting any of the ammunition other then the testimony of Derrick Gill. No one else testified to that.

So, in his case there is no testimony showing premeditation. There's no preparation, there's no [110] deliberation on his part that would constitute First Degree Murder. So clearly, Your Honor, a motion for a directed verdict on First Degree Murder on behalf of Mr. Perkins is clearly in order. And the law in this case is that the Court in passing on a motion for a directed verdict acquittal must 1) consider only the evidence which was introduced at the time that the motion was made, which we have in this case evidence from the prosecuting attorney. 2) View the evidence in light most favorable to the prosecution. And 3) determine whether that evidence would justify a reasonable man including that all elements of the crime were established beyond a reasonable doubt. This fact is not the case. Premeditation is missing from that. There's no evidence of premeditation in this, in this matter. And I would cite to the Court the case of *Jackson vs Virginia* in the United States Supreme Court case, 433 U.S. 307, Michigan case on that point would be *People vs Hampton* 407 Supreme, Michigan Supreme Court Reports 354, and *People vs Fudge* 66 Michigan Appeals at 625.

The question, I guess is whether or not there's any evidence, real or circumstantial, on which you as the court or, can make a determination that a jury can reasonably infer all the elements in this case or underlying all the elements of the crime charged citing *People vs Burs*, 62 Michigan Appeals 204. And all the [111] elements would include premeditation.

Your Honor, that's missing in this case with respect to the case against Mr. Perkins. There is not elements that he was involved in any type of premeditated murder. As a matter of fact its clear from the, the evidence presented that the, the bullet, in fact, that was shot that killed the deceased was accidental. It, it hit a friend of the, the other two codefendants that are charged. So with respect to that there's no case of First Degree Murder against, against my client Dameon Perkins and I would ask that the Court to grant my motion for a directed verdict of acquittal on that charge.

THE COURT: Prosecution?

MS. CUMMINGS: I just want to join in the arguments and citations of Mr. Doll.

THE COURT: Okay, fine.

MR. STAMOS: Yes, first of all, as to the intent aspect of it I know we've all heard it transferred intent so I wasn't even going to speak to that, I thought that was obvious. But talking about Defendant Vincent and Defendant Perkins first of all, and talking aiding and abetting action type of situation with circumstantial evidence and with direct evidence as all of them, but especially in terms of Vincent and Perkins. We've got testimony that, that Vincent went home and picked up at [112] least one gun

probably two, the inference is probably two but direct testimony had one. That there's testimony that he picked up 'cause he was expecting trouble. We've got testimony from people in two different cars, not in the Vincent car, or these people car but two different cars that went up there that they were going up there to meet girls and to fight. That combined with Vincent's testimony that he was expecting trouble I think infers having the gun for some purpose other than honorable or legal. We have testimony that Vincent shot the gun at the North Flint Plaza to see if it worked in the air. That they went back up to Hamady the second time. They went the first time then went home and got the gun. That's important. That they went back up to Hamady. And I'm talking about Vincent with the gun. That there was an argument. Folks up, folks down. The testimony they surrounded the car, at least that their group, not directly Vincent but their group which goes along with the fact that they were up there to fight. That all four people in the red car including Derrick Gill got back in the car. That Vincent was identified along with Perkins as being in the back of the car. The hatch was popped open and at that point after the hatch was popped open, or at least lifted up, Vincent and Perkins were back there and both fired the gun or guns in the direction of the Hamady students that had been involved in the argument. [113] I think there's plenty of evidence showing that Marquis Jones was in that area too and the obvious inference is that he did get hit by a mistake but the guns were pointed in the direction of the Hamady students.

Even, even Vincent's actions afterwards in getting rid of the one gun, busting it up in his statement, busting it up and throwing it away in little pieces, as well as just

turning over the long barrelled gun go to show a specific intent that he had with that gun.

Perkins was showing the long barrelled gun to people on the way to Hamady. We had two people testify to that. One person said he had it right in his pants, was showing them that gun on the way to Hamady school the second time. There's testimony that he went to a home or directed them to a home to get bullets. And there's also testimony that the long barrelled gun took bullets that were different from the long twenty-two bullets that we have into evidence. So that kind of makes sense that he would be directing them to get bullets.

And then along with that we have the testimony the same as with Vincent, that the hood was popped up, both of them had went back after this argument, went back got in the car, got in the backseat and the hood goes up. And then from both people. From Perkins and from Vincent both guns pointed in the direction of these Hamady [114] students. The shots fire. Now Perkins shot, as testified to, at another car even after they left the school going down Carpenter Road. So it even more solidifies his intent. And I think when you look at all of the circumstances about how they went back to the car after this initial argument, them going up to the school with these guns, and with the intent that can be inferred, as to why they went up there, and I'm not going over it in terms of making a final summation to the jury. But the point is deliberation, reflection, premeditation can be arrived at in a matter of seconds. it's up to the jury to make that time.

I think the Court should look in terms of its decision at the evidence most favorable, in a light most favorable to

us. And when you have these people who went up to this school with these guns and they get in an argument and then they walk back to this car and they get in the back seat, the two with the guns, pop up the hatch and then shoot that that certainly gave them enough time to reflect and premeditate on how they were using that gun. And they pointed it in the direction of the Hamady students. It doesn't matter that another person was killed, the intent to kill is reflected by how they used the guns and the premeditation deliberation and is reflected by how they went about using the guns, going back [115] to the backseat of a car, popping up the hatch.

Now as to defendant Hopkins, we've got – my basic position to him is that he was a part of this whole enterprise, and I realize he has to have some positive action. Not just being there is not, enough I understand that. We have testimony this gun was his, the long barrelled guns. We have testimony that he requested the ammunition when they were at the Vincent home to be gotten. We have testimony that he shot when they were at the North Flint Plaza in seeing if the guns worked. We have testimony that Hopkins shot his long barrelled gun or his gun at that point. We have testimony that he was with this whole group of people when they were talking about, or the inference would be that they're talking about going up there expecting trouble. That's why they went back to get the gun, that's why he had to get the ammunition. So it shows a certain state of mind that he was aware of. That is Hopkins. Especially when he asked if the ammunition be gotten and the gun being his. There's a certain inference there. And that he was out of the car, I think it's important to, to realize that he was in the car when they went to get bullets with Perkins. He was out of the car at

Hamady. It wasn't like he just stayed in the car, he was out of the car during this altercation. And it was testified that all four men got back into the car at the [116] same time and then it was requested that the hood be popped or the hatch be popped open. Now he's in the driver seat at that time. Knowing everything that's went on beforehand and that's important. And that the hatch was then popped up. The shots were then fired and then he, Hopkins, drove away. It's not like being completely ignorant of anything that went on before and then just jumping in a car and driving away. He knew these things before, he had taken a part. It was his gun, he had shot it.

Also he took part in getting rid of the gun. There has to be a reason for that. He took part according to testimony on getting rid of the two guns. And then I think that his statement, well not being a major portion of the case certainly does have some bearing in that when he was asked to give a statement he denied knowing anything about the gun, seeing anybody shooting, denied anything about a hatch being opened, anything in reference to that car and guns in that car he denied. And at that time I think that that can be inferred that he had, it can be inferred a lot of ways but it certainly in one way can be inferred that he had a measure of guilt on his mind as to his participation. But we have the other facts that I've talked about that directly point to his aiding and abetting and participating in the crime.

THE COURT: Anybody else?

[117] MR. ODETTE: No, Judge, I have nothing else. Thank you.

THE COURT: Nothing else? Well my impression at this time is that there's not been shown premeditation

or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

MR. DOLL: Thank you, Your Honor.

THE COURT: Now are we ready then for our jury?

MR. ODETTE: Judge, if, I'd just like to take up one more thing. The last thing and that would be the, [118] actually the procedure that would be involved here on out. It's my understanding looking at case law that the accepted procedure would be that Mr. Doll's jury would not remain in the courtroom during the defense of either Mr. Hopkins or Mr. Vincent and vice versa. If Mr. Doll chooses to put in a defense that our jury would be removed from the courtroom also and that's my understanding of the case law and I've . . .

THE COURT: My general impression is you're in charge of your own defense. You should be able to select your own jury. I've turned to the prosecutor at every time

and I've said the same thing to him. Do you want both juries or don't you. I mean you've got your proofs, you want to present them, you should be able to choose your audience. And I think that here you are, you've got a situation where you're arguing obviously on behalf of your individual client, you should be able to talk to the jury that's involved. Basically I think that's the way it ought to be handled. So we treat everybody alike.

MR. ODETTE: Correct. However that, and I'm, if I could cite a case to Your Honor. *People vs Brooks* at 92 Michigan Appeals at 393. That upheld the idea that both juries could be present during the prosecutors direct case only. But that only the jury hearing the [119] particular case would be present . . .

THE COURT: Well haven't I already said this?

MR. ODETTE: Is that what you said?

THE COURT: I thought I heard myself say that.

MR. ODETTE: I'm sorry, Judge.

THE COURT: Maybe I wasn't hearing my words.

MR. ODETTE: Maybe I'm getting to the point I'm arguing with . . .

THE COURT: No, I said the defendant should be able to select the jury they want to address.

MR. DOLL: I guess then it . . .

THE COURT: Therefore that's your choice.

MR. DOLL: I guess it's a housekeeping –

THE COURT: So if Mr. Doll if you say you want the jury that involves your man only to hear your defense, fine let them hear it. And if Ms. Cummings and Mr. Odette want that to be done, fine that's their choice.

MS. CUMMINGS: I think I understand that, Judge.

THE COURT: I don't think I was ambiguous.

MR. ODETTE: Okay, I'm sorry, Judge. I . . .

THE COURT: I, you know I try to do things by common sense. What's a sensible approach to this subject. [120] I let one side decide as they present the evidence who should hear the evidence involving them if there's no conflict and no statements that would be prejudicial to one of the defendants. Then when you're time comes, you want to make a pitch to that jury that involves your person and you think there's some value in doing that, fine, I'll give you the chance to do it.

Now who wants to go ahead?

MR. DOLL: It's a housekeeping problem.

THE COURT: That's it.

MR. DOLL: Who wants to go first I guess.

THE COURT: Who wants to proceed? I'll let you make your own decision.

MS. CUMMINGS: Why don't you.

MR. DOLL: Okay, if I, if I'm gonna present my case then I'll assume Mr. . . .

MS. CUMMINGS: We want our jury out.

MR. DOLL: Ms. Cummings have the option to whether they want their jury to hear what I'm going to present.

THE COURT: I'll let them choose.

MS. CUMMINGS: We want our jury absent.

THE COURT: You don't want them to hear?

MS. CUMMINGS: Correct.

THE COURT: Fine. Who wants to go ahead [121] first, I'll let you choose.

MR. DOLL: I'll go first.

THE COURT: You'll go first, all right. Then that does help me because we then can have the other jury leave and have that handled. So, how long do you think it's going to take?

MR. DOLL: Your Honor, I have two witnesses I expect to present which would be . . .

THE COURT: Then we want the other jury back certainly tomorrow. Right?

MR. DOLL: I would assume so.

THE COURT: Okay. Why don't we do that. How long do these witnesses going to be?

MR. DOLL: One is a witness that's testified, Bobby Howell, already should be a short witness.

THE COURT: All right.

MR. DOLL: The other one is my client which I would expect to take a little, a little time.

THE COURT: Give me a time sequence approximately.

MR. DOLL: Hour and a half, two hours.

THE COURT: All right. Then I think what we're going to do, we're going to take your one witness and your other witness both in the same day, tomorrow.

MR. DOLL: That's fine.

[122] THE COURT: I think that's the sensible thing because we're bringing back the jury just to hear one witness does make an awful lot of sense. So we'll take care of yours tomorrow morning. We'll have the jury come back and we'll, I can have them told by the court officer. I don't think they have to come back in. Because you'll close in front of each jury separately tomorrow then. I want to remind you that Mr. Stamos because you haven't closed in their presence. So when they do come back tomorrow each one of them, you'll mention that you're closing your proofs at that point.

MR. STAMOS: Yes.

THE COURT: Okay. Fine. So what we'll do is this. We'll have the jury for Ms. Cummings and Mr. Odette return tomorrow morning at ten o'clock. We'll have the jury for Mr. Doll's client to return tomorrow morning at eight thirty.

Now you can have them leave, I'm going to have anybody having any connection with the case who are in the hallway, can we make certain that they're here seated. Is there anybody in the hallway now at all?

If they have any connection with this case. No, if it's another case that's fine, they've got a right to be there.

MR. DOLL: Excuse me, Your Honor.

[123] THE COURT: Yes.

MR. DOLL: I have one witness subpoenaed in the hallway, Bobby Howell. I'd like to have him come in.

THE COURT: All right. We're going to have these people remain here. We'll take the defendants up first so that that's clear. Now we'll take the defendants upstairs. Thank you. Everybody remain here till everybodies cleared away.

(Whereupon, the defendants leave the courtroom.)

MR. STAMOS: When the juries come back tomorrow can I make a brief restatement in terms of the First Degree Murder . . .

THE COURT: Yes, I'll be glad to hear it. Sure. I'm always glad to hear people.

MS. CUMMINGS: So that means we have to be here at eight thirty then?

THE COURT: I assume so, yes. If he wants to make a statement it should apply to everybody.

MR. STAMOS: Yes, I'd just like to look up, find some law.

THE COURT: That's fine. I'm glad to hear you. Whatever you want to do is fine with me.

(Whereupon, court ended in these proceedings at 1:03 p.m.)

PEOPLE OF THE STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs File No. 91 45890 FC

DUYONN ANDRE VINCENT, (Filed Nov. 29, 1999)

Defendant.

_____/

VOLUME V-A

BEFORE THE HONORABLE DONALD R. FREEMAN, CIRCUIT JUDGE

FLINT, MICHIGAN – WEDNESDAY, APRIL 1, 1992

APPEARANCES:

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Diane Baker, CER 5276

* * *

[3] Flint, Michigan

April 1, 1992 – 9:27 a.m.

THE COURT: Mr. Stamos, you had indicated that you wanted some additional time to make a presentation. We have everybody assembled I think all the defendants are here. Fine. I'll be glad to hear you.

MR. STAMOS: Yes, thank you, Judge.

Okay. While this doesn't have any direct bearing on my presentation to the Court in terms of weight I state this merely to impress the seriousness at least of my, my attitude in this that there have been other cases not having anything to do with this case in which the same motion has been brought and I have not opposed it. So I mean I don't want to form a character that's, or appear like somebody that's totally gungho regardless of the facts or anything of that nature.

THE COURT: Fine.

MR. STAMOS: I am basing my argument and my position on the facts as I see it, the Court may not see it that way but I'm basing my position on the facts and the laws I see it pertaining to this case.

And in that regard I believe the law is such that where the evidence has been introduced which could possibly establish premeditation it's the juries province to measure the quantity of the proof bearing on that issue. [4] And that the Court should not substitute its opinion for the juries. And that under the *Hampton* case the evidence should look, be looked at in the light most favorable to the prosecution and that if any reasonable person could deduce the elements of First Degree Murder, and we're

talking about the premeditation and deliberation aspect, then it should be allowed to go to the jury. That doesn't mean that all reasonable people would deduce that, but if any reasonable person could deduce from the evidence looked at in the light most favorable to the prosecution, elements of premeditation and deliberation then the case should be allowed to go to the jury.

In some of the courts, and I just want, I'm using this aspect of my presentation to set the stage and the feeling of that the courts are varied on this issue of premeditation and deliberation, you can't just find one specific case although I found a couple that are somewhat analysis.

The Court, there's been language such as this. The Court in *People vs Moss,* 1976, made this statement. "That while thermal terms dramatically convey a distinction with a difference, are we to say that even a savage attack, attack cannot be premeditated. We do not agree with the implication that First Degree Murder comprehends only cool, calm, deliberate assassination. [5] Such thermal rationale affords a ready vehicle for reversal when the appellate courts philosophy is offended by the jury verdict."

Now it does go on to say to put it more bluntly, premeditation is a question of fact not of law. And then they go on and they say "we are not unmindful of respectable authority to the contrary in this state." Because it does go back and forth.

Some of the factors that the Courts look at cause it is like a case by case and they seem to say in the end, if you read enough of these cases, that you have to be able to find that there's no evidence of First Degree Murder in order to be reversed. I mean if they can find any of evidence of

First Degree Murder they'll, they'll let the trial courts ruling stand, letting it go to the jury on First Degree Murder. In fact, in cases where, where they have reversed they, they just knock it down from First to Second, they haven't reversed the whole case. But, in *People vs Mullaney* the factors are talked about and it says on page 793, and this is at 104 Mich. App. 787. "Factors to be considered when determining whether an accused had an opportunity to give his actions a second look include consideration of the previous relationship between the parties. Here there has been an altercation. The accused actions prior to the killing. Here we have these [6] people . . . " and I'm going to make as factual aspect of my or of my presentation a little more clear after I portray the law to the Court. But we do have them walking back to a car, and that's important, and positioning themselves in a manner to do the shooting. I think that's very important. It says the accused actions prior to the killing. The circumstances of the killing itself and the accused conduct after the homicide. And then in this case it says at the end, "even though evidence tending to establish that defendant acted with premeditation and deliberation is scant, we cannot say that it is as a matter of law insufficient." And what that case was about, the only evidence of premeditation and deliberation in the *Mullaney* case was basically the acts of the defendant after the killing. The planning and they talked about the, the accused conduct after the homicide. Not the other factors. So, and there's a lot of cases that talk about you can find premeditation deliberation from one of these factors. You don't have to have all of them. And it was scant, but they still upheld it.

In *People vs Meyer,* 47 Mich. App. 179 on page 191, it talks about "our own answer to the question of the appropriate rule to follow as to what constitutes premeditation in a First Degree Murder case is not a definition. Rather it is a reaffirmation of the rule of [7] the trier of fact in deciding the degree of guilt of an accused under the following established principals. 1) Premeditation can be reasonably inferred from the circumstances surrounding the killing. Circumstantial evidence. 2) A defendant may not be found guilty of First Degree Murder if he did not have an opportunity to subject the nature of his response to a second look or reflection. IE one cannot instantaneously premeditate a murder," and I had the *Tilly* case which is going to speak directly to that. That's why I think that as I go on the act of, of these people going back to the car is tantamount in my position.

"3) A sufficient time lapsed to provide an opportunity for a second look may be nearly seconds. It's not the matter of time. Merely seconds or minutes or hours or more depending on the totality of the circumstances surrounding the killing." So it recognizes it could be only a matter of seconds depending on the situation of how it happens. "And 4) where it is factually clear that there is no evidence of premeditation the trier of fact may not consider a charge of First Degree Murder." That's where I got that language. But that language is not just with this one case, you can find that language in other cases where the courts look in terms of a standard where there is no evidence. So if there's some, it, it's fine.

[8] And the last in terms of some of the talk as to the law is *People vs Youngblood* 165 Mich. App. 381, on page 387. Talks about "premeditation and deliberation may be inferred from the facts and circumstances surrounding the

killing, including motive. We have motive here. The altercation. As a result of a prior relationship." We have that, it was established during the altercation. "A weapon acquired and positioned." And I think the positioned in terms of going back and I'll get into that a little more later. "A weapon acquired and positioned in preparation for the homicide. Circumstances and events surrounding the killing. An organized conduct or subsequent to the killing. Organized conduct prior to or subsequent." Organized conduct prior to also. All four of them, Gill too, but he didn't do anything once he went back to the car. Going back to the car and positioning themselves and I'll get into that again but I just want to relate the facts of this case to some of this language. And organized conduct prior to or subsequent to the killing suggesting the evidence of a plan.

Now, in regard to all of that, I have two other cases but I want to lay out my factual position here in regard to this case. My basic position is, although it's made stronger by the surrounding circumstances that I'll explain, is that during this altercation we don't have [9] anybody just pulling a gun during an argument and shooting. All right which would be instantaneous. We don't have a situation where people are just carrying a gun and not expecting trouble and trouble develops and the gun is just pulled. We have a situation where there's an altercation and we have these three people walk back to this car, get into this car and two of them, who are the shooters, position themselves on their knees in the back of that car in a position to shoot. And the hatch is then popped open with these people being in a position to shoot, with the driver in the driver's seat and when the hatch pops open it is then that the guns are there, they are shooting at the person or

persons from Hamady that were involved in the altercation.

So you have people who are involved in a group in an altercation walk back and position themselves in a way, together, both, to shoot and then take off. That's much different from just pulling your gun, booming.

Now with just that. Forget the fact that the guns were brought up there expecting trouble. So you have a certain intent there. Maybe not the intent to kill a specific person but you do have that thought about how these guns might be used before they even get up there. Which makes the aspect of them walking back to the car and [10] getting into it even more deliberate and premeditated and organized and thought out. You know with a purpose.

Forget the fact that the guns were fired to see if they worked and forget the fact that there was evidence that people heard from that car that "we got something for you" which signified I asked the witnesses on the stand what did that mean to you, that meant that there was going to be shooting. Forget that fact that it was also heard coming from that car, that "if you don't get away from my car I'll pop you." What did that mean, that I'll shoot you. Forget all that which makes the premeditation, the thought out process even more significant. But if you just take the fact that there's an altercation and people go back to the car and position themselves in a way to shoot somebody that was involved in the altercation thats outside, top hatch up be ready to get away when the car takes off, that should be enough to get me to the jury. That's no different then [sic] somebody getting in an altercation and going home. If the home is you know in the, in the vicinity and getting a gun. There may be a matter of seconds or minutes difference.

But it says here, very clearly in these cases, that if the totality of the circumstances and the reflection and deliberation can be calculated very quickly. If fact, *People vs Tilley* I think really speaks to this. There's a California case too, but [11] *People vs Tilley* really speaks to this clearly.

It's 405 Mich 38. It's a 1979 case. And I'm reading from pages 44 and 45. "A careful review of the testimony in this case persuades us that there was evidence to support the juries's verdict. For purposes of illustration we list several factors surrounding a homicide which support the juries verdict. We do not intend to imply that any one particular factor is essential to a finding of premeditation and deliberation. But that only by reviewing the circumstances as presented to the testimony of the witnesses can a determination be made.

First, we realize when a homicide occurs during a sudden affray this Court has found it would be a 'perversion of terms to apply the term deliberate to any act which is done on a sudden impulse.'" That's what I'm talking about. The Court's smiling but that's what I'm, I've read this case carefully. That's what I'm talking about when you're, when you're fighting and you have a gun and just pull it. That's what the Court's talking about as I go on.

"In this case the testimony presented allows the jury to find that the fighting had ended," because this wasn't a fight. The fight had ended when Tilley obtained possession of the gun. These people went back to the car. The fighting had ended, they went back to the car, it [12] wasn't done during this fight.

"Or too Michel began retreating." The Hamady kids were walking away. We have testimony to that. There was also testimony that Tilley and Moss who were in control of the situation, holding Michel before Tilley started shooting. And then it goes on. "A second consideration is the time required to premeditate and deliberate. While the minimum time necessary to exercise this process is incapable of exact determination the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a second look." And then they, they go on and they put that together.

"There was an interval between Tilley securing possession of the gun and the first volley of shots as Mickel was retreating. The testimony presented various estimates of the time lapse ranging from one second to one minute." We certainly had a time lapse of them going back to the car. The fight was over. People were getting back in their cars. These people went back to the car and position. I keep going back to that. Forget what was in their mind on the way up there. This certainly does take their actions all the more apparent. Forget what they said from the car about "we'll pop you," "we've got something for you," which certainly makes their actions [13] even more apparent. But just the simple action when the, when this altercation is over. And it was an argument more than a fight, of going back and positioning themselves in that car to shoot someone and get away. Two people in the backseat, on their knees, side by side with the gun point out and the hatchback pops open. It's not even like two people shooting from different windows. The hatch pops open. And it was asked to be popped open.

I ask the Court to look at *People vs Tilley*. There was also a California case that, I can get the cite, I left the cite, and I apologize to the Court. I can get the cite. I have a copy of what I thought was appropriate language. That, where they review what premeditation and deliberation is. And they talk about, number one, facts about a defendant's behavior before the killing. They show, the show prior planning of it. Facts about any prior relationship or conduct with the victim from which the jury could infer a motive. And then three, facts about the manner of the killing from which the jury could infer the defendant intentionally killed the victim according to a preconceived plan. And you can form this and calculate this quickly. That's the point. I've read before that these things can be formed quickly. In fact I think there's in one of these cases there's language to that effect that you can do that quick. And if I have to go back and find it I will. That, that when they walk together back to that car and I keep going back to that, that's organized conduct. It can be taken no other way. That when the hatch pops open there's two people on their hands and knees. That was the evidence. Whether it's believed or not is one thing. Whether it can be argued against is another thing. But I have that evidence to go to the jury with.

It talks about, and I'm going back to this California case. As to the first category, and this is where these two defendants brought a gun into a store. It wasn't a robbery, they just brought a gun into a store. "As to the first category the fact that the defendant brought his loaded gun into the store and shortly thereafter used it to kill an unarmed victim reasonably suggests the defendant considered the possibility of murder in advance." These people took these guns up to this school. We've had testimony

they went up there to fight. That they expected problems. So at least they considered. You can argue, I can infer that here they considered the possibility of using these weapons to kill in advance. Maybe not in the way they did it, but at least that was in their mind.

THE COURT: What's the citation on that case?

MR. STAMOS: This is the California case, [15] I'll have to get that for you, I apologize, and I can get that for you.

THE COURT: All right, I'd like to see that. That's interesting.

MR. STAMOS: "Moreover defendants warning that Chandler and Black should give him the money or he would shoot implied the defendant contemplated the killing." What we have, the words coming from the car. "Get away from the car or we'll pop you" or "I'll pop you." I think it was was the word. Or "we've got something for you."

"It has been recognized that premeditation can occur in a very brief period of time." I'm still quoting from this California case. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow," this was my language, "thoughts may follow each other with great rapidity and cold, calculated judgement may be arrived at quickly." That's the language I was thinking about, I just hadn't got to it.

"As to motive the evidence showed that immediately prior to the killing Chandler and Black refused to sell beer." Well they're talking about there was a motive in that case, there's a motive in this case. Obviously everybody said they

were shooting at the, at the [16] people from Hamady who were involved in the altercation.

"The law does not," I'm going on, "the law does not require that a First Degree Murderer have a rational motive for killing, anger at the way the victim talked to him may be sufficient."

Then I go on, I think is very important in this California case in terms of the car. "The manner of the killing also suggest the shooting was conceived in advance." The manner, I'm going back to the car, the positioning themselves with their, on their hands and knees in the back of that car, weapons pointed right at these Hamady people and top goes off, the shots, and the car leaves.

And then they finally say, "we conclude the evidence viewed in the light most favorable to the prosecuting supports the finding of premeditated and deliberate murder."

That's basically my position. I can find the cite if the Court will allow me just a moment on this California case. But my basic position is the acts of these defendants, before even going up to Hamady and getting the gun, certainly puts some kind of thought process of using those guns into their minds. Maybe not the exact way they were used but some kind of thought process of using these guns. And then when they got up to Hamady and this [17] altercation started there was organized conduct at that point. The altercation had ended. And they separate themselves from it by walking back to that car and positioning themselves in a way to, in a organized way to shoot at those people from Hamady and to leave. They were hidden in the car, they were protected in that car, they could leave right after the hatch went up with both of

them side by side on their hands and knees, and that's not even paying any attention to the words that came from that car such as "we've got something for you" and they certainly did. "We'll pop you," and they certainly did. I think taken in the total context of how this case happened and with the many statements on the law of premeditation and deliberation that maybe not every reasonable trier or [sic] fact would or will conclude on each and every one of these defendants or any of them that First Degree Murder was, was committed. But certainly there are facts from which a reasonable person could conclude that there was reflection and deliberation. That's my position.

THE COURT: Thank you very much. Comment by other counsel?

MR. ODETTE: Yes, Judge.

THE COURT: What I'd like the other lawyers to talk about if you don't mind, is the factual situation. Now that's impressive what I heard from Mr. Stamos about [18] the circumstances that lead up to this and the language that was used, the position of the parties within the vehicle, the altercation. Those are the things that do bother me and if you'd like to talk about that I'd be very interested in hearing.

MR. ODETTE: Judge, I would but I'd like to speak just very, very briefly to another aspect of this and I think that it's a very significant, it's the significant aspect I believed. And that's the question that yesterday we made arguments to the Court. The Court considered those arguments. We, the Court very distinctively and clearly stated the basis for its ruling and utilized the test of looking at the evidence in the light most favorable to the prosecution. And after doing so, directed a verdict on the

question of the First Degree Murder and indicated the case would proceed to the jury on Second Degree Murder.

Now citing the case of the, I think the rule that governs here 6.419, and there was no reservation of the motion for, reservation of the decision by the Court. The Court issued its ruling. And it would be our position that the Court being vastly experienced and having sat many trials over a substantial, over a period of time, is fully aware of the law concerning First degree Murder. And indicated and made a ruling. Now the Constitution has a provision, the double jeopardy provision, that both the [19] Michigan and United States Constitution, citing from the case of *People vs. Anderson*, 409 Mich., 474, that would suggest that once the Court has made a ruling, once there's been a determination that that is a final ruling. And they indicated that that would apply whether the acquittal, in this case a directed verdict of acquittal, is based on verdict of a jury or the findings of a judge and whether that finding is erroneous or not. Now we would suggest . . .

THE COURT: Counsel, you have to bear in mind, I've not informed the jury of any of these things. You must recall the fact that we did not have the jury even brought back to the room. That because of our schedule and because of the representation made by Mr. Doll as to witnesses and the length of time that would be needed, we decided it might be better to start this morning so as to have some continuity in their testimony.

MR. ODETTE: Right, Judge, I . . .

THE COURT: So the jury knows nothing about any of this.

MR. ODETTE: That's correct, they don't. I'm not disputing that but it's my firm impression when I left the court yesterday that there had been a ruling and that Mr. Stamos had indicated he'd like to have the matter reconsidered and I believe the Court said whatever.

THE COURT: That's right. And I, well I said [20] "yes I'd be glad to listen." Or words to that effect.

MR. ODETTE: Well it's our position that at this point that that decision was made. We . . .

THE COURT: Do you really believe that? You think that when a decision is made that before it's recited to the parties who are directly involved in it and particularly the jury because we're asking now for the jury to not consider certain factors that might be brought to them, that a Court cannot consider what it's done? I don't know that that's right. I, I consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not, I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.

MR. ODETTE: That's . . .

THE COURT: You understand what I'm saying?

MR. ODETTE: I do.

THE COURT: And I've not told the jury anything.

MR. ODETTE: I do entirely, I don't dispute any of that. But I, it was my firm impression and belief that the Court had made a ruling . . .

THE COURT: All right.

MR. ODETTE: That . . .

[21] THE COURT: I would much prefer frankly that you go on and discus some of the things that he said about the factual circumstance. If you want to respond to it, if you don't care to, that's fine.

MR. ODETTE: I would suggest what I suggested yesterday quite frankly . . .

THE COURT: All right.

MR. ODETTE: That the issues here are premeditation and deliberation.

THE COURT: That's fine.

MR. ODETTE: Mr. Stamos continues to suggest that guns were taken up to the school with the notion that they were going to be used in an offensive manner, contrary to testimony of witnesses who indicate that, as far as this particular defendant is concerned, that when he went to the school he went or arrived at the school he went to the school. He didn't go to the car with the intention. There can be no inference that his intent of his specific purpose of being there was to utilize these guns in a criminal manner. There's absolutely no dispute about that fact. That, and so any suggestion that the guns were there for, to be used in a premeditated way absolutely fails. There's absolutely no proof before the Court in that regard.

THE COURT: Fine.

[22] MR. ODETTE: And I simply would continue my response from yesterday. That there's a absence of premeditation and deliberation for the reasons that I set forth on the record today. I'd ask the Court to direct the verdict or continue this verdict as Second Degree. Mr. Stamos still, he's indicated he wants to go [sic] the juries. He is no [sic] being precluded to go [sic] the jury, the only question is on what charge.

THE COURT: Fine. Thank you very much. Ms. Cummings?

MS. CUMMINGS: Yes, Judge, on behalf of Mr. Hopkins I would join in all of the arguments Mr. Odette put forth including the procedural and Constitutional ones.

As to the facts as they now are being reargued –

THE COURT: You think double jeopardy has anything to do with this?

MS. CUMMINGS: Yes. I believe once you've directed. A verdict –

THE COURT: Why is that?

MS. CUMMINGS: A verdict that that's . . .

THE COURT: I haven't directed a verdict to anybody.

MS. CUMMINGS: You granted our motion.

THE COURT: Oh, I granted a motion but I have [23] not directed a verdict.

MS. CUMMINGS: I don't need to add to that, I'm simply joining in that argument.

THE COURT: Okay, that's fine. That's fine.

MS. CUMMINGS: As to your specific request of how I would respond to additional comments made today everything I said yesterday stands. In addition to that, Mr. Hopkins stands quite peculiar as to the other two defendants in that he did not have a weapon. And Mr. Stamos keeps using the, the word "they" as if all three of these defendants conducted themselves in the same manner. Mr. Hopkins was by the car. I don't think there's any evidence before you that he acted in concert walking toward a vehicle with some state of mind present. If I heard Mr. Stamos argue he's saying that this decision, he's arguing this decision to shoot and make this killing premeditated was arrived at very quickly. But as an aider and abettor you would also have to find there's some evidence that at the same time a shooter formulated this state of mind that Mr. Hopkins at that same brief state of mind joined in and shared that mental intent. And I don't think there's been any evidence of that.

There's no evidence that Mr. Hopkins was expecting any trouble or that he was, had offered himself up as an ally to any trouble that might occur. He simply [24] was present and it was most interesting I thought when, when Mr. Stamos made the statement, "well, Gill was there too, but he didn't do anything afterward." The state of mind that you have to find for premeditation isn't found in, in what anything, in what occurred afterwards. You have Mr. Hopkins driving away from the scene, after the shooting occurred, and I don't think that gets him in on a first degree charge that he shared the proper state, state of mind in the intent that's required for that and I would request that you reaffirm your decision.

THE COURT: Fine. Thank you very much.

Mr. Doll?

MR. DOLL: Okay what, what we're talking about in this case is the basic difference between First and Second Degree Murder. It's the element of premeditation. The courts have determined that you should look at the totality of the circumstances. Which I think that's what you did when you made your decision yesterday.

To premeditate is to think about beforehand. To deliberate is to measure and evaluate the major facets of a choice or problem. Both describe a thought process which is undisturbed by hot blood. The minimum line time required to develop these thought processes is uncertain. Again, going back to the totality of the circumstances.

The interview between the thought and the [25] action should be long enough to afford a reasonable person time to subject the nature of his response to a "second look." And this was symbol with the law, Michigan law that Mr. Stamos got into. That citation on those, those circumstances are from *People vs Moore* in 31 Michigan Appeals 301 and *People vs Johnson* 99 Michigan Appeals 547.

Now the factors which you may consider in determining whether the defendant had the opportunity for a second look include 1) the previous relationship of the parties. Confining your thoughts to Mr. Perkins previous relationship to these parties, the people he was in the car with, there was none. He didn't know these guys. The only reason he was in the car is that two minutes before he made a determination that the car that he rode in was too full. So he jumped into this car with three other people

that he didn't know. Two minutes later he's at Hamady High School.

Second thing, the defendants actions prior to the actual killings. There's no testimony on this record that the Court can infer that this Defendant, Dameon Perkins, was any way involved in any altercation prior to the shooting at Hamady High School. There's no testimony that he said, said anything about "I'm going to pop you." There's no testimony on this record that he was involved in any argument with anybody in the parking lot. There's no [26] testimony that he said anything, that he did anything or that he was even present at the time that the argument took place.

We've got to infer from the circumstances that yes in fact he was at Hamady High School. But other then [sic] that that's all we know. That's what we're confined with the record at this point.

And then three, the circumstances of the killing itself. I've got a real problem on this case. This particular thing, Judge. Because the only witness that testified that Dameon Perkins, Perkins knelt in the car or the back of this car and shot his gun was Derrick Gill. He's the only person that testified like that. And my problem with that testimony is that his testimony is unreliable, unbelievable and has shown on this record that he's a liar. He's the only person that testified that at Hamady High School there was a gun in Perkins's hands.

Now let's go back to the totality of the circumstances. Given the totality of the circumstances this defendant did not know, was not familiar with any of the people that he's in the car with. The fact that he wasn't involved in any altercation at Hamady High School, that fact that a lying,

unreliable witness was the only person to put a gun in his hand, nobody else, nobody else testified to that, would not make his actions such that [27] constitute premeditation.

The fourth thing to look at is the defendants conduct after the homicide. Now there's not too much evidence on the record. What Mr. Perkins did after the, after the homicide was [sic] occurred other then [sic] the fact that he was in the car. But, you can infer from the circumstances that all of a sudden these guys got in their car. Not only that there were two other cars that were in the same group, those guys got into it at the same time, they all took off at the same time.

Again, going back to the totality of the circumstances, you can't reasonably infer that there was any element of premeditation on behalf of Mr. Perkins that would allow this case to go to the jury on the question of First Degree Murder.

Again, citing *People vs Johnson*, 99 Michigan Appeals, 547. There's no evidence of a plan that Mr. Perkins was involved in. He didn't get the gun, he didn't get the bullets. Those were secured by Duyonn Vincent. He wasn't even in the car at the time that the guns were, were purportedly shot off at North Flint Plaza. The only element prior to the killing that he had a gun, there is testimony that he showed it at the party store, one of the guns. Again, it was not the murder weapon, to one of his friends at the party store. And apparently the gun kind of [28] impressed him. But that's, that's beside the fact that there's no element, evidence of any plan by Mr. Perkins to commit a killing.

So we're back to premeditation. There's no deliberation. There's no showing that the jury could reasonably infer that the case should go to the jury on the element of

premeditation of First Degree Murder by Mr. Perkins given the, given the facts that we presented so far in the Prosecuting Attorney's case. And that's substantiated by the law.

Again, we're back to the totality of the circumstances are not enough in this case to justify a charge of First Degree Murder going to the jury.

THE COURT: Fine, thank you.

MR. STAMOS: Judge, could I just briefly respond to Mr. — just for the record.

THE COURT: Let's move right along. I've got so much to do.

MR. STAMOS: Okay. I think the Court is aware of what's going on but I just want to briefly respond to Mr. Doll only. Because I thought I kept my summation and my position to the law. Not arguing the facts, not arguing believability of testimony cause that's for the jury, that's not for this issue.

MR. DOLL: The Court asked me to argue . . .

[29] MR. STAMOS: Hold it, I didn't, I didn't interrupt.

THE COURT: That's, go right ahead. Let him. What do you want to say?

MR. STAMOS: I just wanted to make that point clear. But in terms of his client specifically, which I didn't get into cause I still, my position is they all went back cause the evidence shows that, to the car. But if he wants to make an issue out of what his client did in terms of getting into this car, his client not only showed the gun

before getting up to Hamady, his client did not have to go back to that car where the shooting occurred at Hamady. His client, in particular, chose to go back to that car. If Mr. Doll wants to make a big issue out of that, chose to go back to that car where the guns were. Where he had gotten into that, the same car he had gotten into where the guns were. Chose to go back to that same car at Hamady, rather then [sic] getting, rather than to get into the car where his real friends were, he chose to go back in the car where the guns were. He chose to position, and I'm talking about his client, Mr. Doll's, he chose to position himself in the back of that car on his hands and knees right alongside of Vincent. He chose to raise that gun right along with Vincent and allow the hatchback to be popped open and then fired. His client chose to do all of those things after [30] they had been up to Hamady for a good portion of time and after an altercation that had happened involving members of their group. That these people, especially Mr. Perkins, chose then to go back to their car where they had some refuge, some hiding ability, some better position to commit this shooting and position themselves in a way that would make this shooting more beneficial to them. Out the window and then take off. And that is organized, calculated thought. Maybe not brilliant thought, we're not talking about levels of thought. But it's thought, thought process that reasonable people could have decided on the way back to that car to just leave.

THE COURT: Well I'm going to consider the argument that Counsel has made. And Counsel should be certainly aware of the fact that there has been no harm that has come about by the Courts ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of

counsel. I'm going to reserve a ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it.

Now I'm basing, of course, the decision upon what we have up until now until such a time as the motion's being made. But I'll reserve the ruling. Okay, we're going to get our jury back then. Now let's [31] see, it's your jury, isn't it Mr. Doll.

MR. DOLL: That's correct, Your Honor.

THE COURT: All right. Do the other people want to be here during that time, what do you want to do? You have a right to, if you want to I'm going to let you stay.

MS. CUMMINGS: My client wishes to be present, Judge.

THE COURT: Be present, fine.

MR. ODETTE: My client so indicates also.

THE COURT: He wants to be here.

MR. ODETTE: Yes, Judge.

THE COURT: Great. Fine.

MR. ODETTE: Thank you.

THE COURT: Good enough. Thank you.

(Whereupon, court ended in these proceedings at 10:07 a.m.)

PEOPLE OF THE STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, File No. 91 45890 FC

vs. (Filed April 2, 1992)

DUYONN ANDRE VINCENT,

Defendant. /

VOLUME VI

BEFORE THE HONORABLE DONALD R. FREEMAN, CIRCUIT JUDGE

FLINT, MICHIGAN – THURSDAY, APRIL 2, 1992

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* * *

[3] Flint, Michigan

April 2, 1992 — 9:19 a.m.

THE COURT: Ms. Cummings, I think we're ready for your jury, is that the next step?

MS. CUMMINGS: Your Honor, my, my client has chosen not to testify therefore we're not putting any evidence on.

THE COURT: Oh, I see.

MS CUMMINGS: So we're ready to rest.

THE COURT: Fine.

MS. CUMMINGS: And proceed to argument.

THE COURT: Fine.

MS. CUMMINGS: So, I don't know how you want to do it. You want to do Mr. . . .

THE COURT: All right, now . . .

MS. CUMMINGS: Mr. Doll's closing and, first and then let us be excused?

THE COURT: Well.

MS. CUMMINGS: I don't know.

MR. STAMOS: I don't care, that's fine.

THE COURT: It doesn't matter . . .

MS. CUMMINGS: That's fine.

THE COURT: If it's one way or the other. And I've reconsidered the ruling that the Court earlier made

and I've decided to let the jury make its own [4] determination on the Degrees. That's where we'll stand now so we'll let them have all those issues submitted to them, First, Second, Manslaughter and you can go on from there. Have you given us any proposed . . .

MR. DOLL: I've got some, Your Honor.

THE COURT: Instructions that you want me to consider?

MR. DOLL: Yes. I've given copies to counsel.

THE COURT: Okay, fine.

MS. CUMMINGS: Judge, I've reviewed the ones that Mr. Odette's prepared. I'm requesting those same ones with the addition of defendant not testifying.

THE COURT: All right. Now let's see what else. Oh, you want reckless and wanton use of a firearm?

MR. DOLL: That's correct, Your Honor.

THE COURT: All right, any problem with that? Did you look at theirs' [sic] yet, Mr. Stamos?

MR. STAMOS: No.

THE COURT: Want to take a look and see what they've got to say?

MR. DOLL: You've got a copy right here.

MR. STAMOS: Judge, while I'm looking at theirs' [sic] the only, the only different instruction I would request would be transferred intent obviously. 'Cause I

* * *

(4)

No. 02-524

FILED
FEB 24 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JANETTE PRICE,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

I.

Whether the Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on *habeas corpus* review.

II.

Whether defendant Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

PARTIES TO THE PROCEEDING

This case arises out of the federal habeas review of the constitutionality of a state prisoner's conviction on double jeopardy grounds. The Petitioner, Janette Price,[1] is the warden of the state prison where Respondent claims he is unlawfully incarcerated for first-degree murder. The Respondent, Duyonn Andre Vincent, is the incarcerated prisoner who asserts that the trial judge's initial reaction relative to his directed verdict motion constituted an acquittal of the first-degree murder charge.

[1] Janette Price is now designated as Petitioner in lieu of Kurt Jones, inasmuch as she is the Michigan Warden where Respondent Vincent is currently incarcerated.

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OPINIONS BELOW

Respondent was convicted of first-degree murder and felony firearm. He appealed his first-degree murder conviction asserting violation of his double jeopardy rights. On February 16, 1996, the Michigan Court of Appeals vacated Respondent's conviction for first-degree murder on double jeopardy grounds. This is reported at *People v. Vincent*, 215 Mich. App. 458, 546 N.W.2d 662 (1996). [Pet. App. pp.14a-25a].

The People of Michigan sought and obtained leave to appeal to the Michigan Supreme Court. On July 15, 1997, the Michigan Supreme Court reversed the Michigan Court of Appeals and ordered that Respondent's first-degree murder conviction be reinstated. *People v. Vincent*, 455 Mich. 110, 565 N.W.2d 629 (1997). [Pet. App. 26a-51a]. Respondent's request for rehearing was denied. *People v. Vincent,* 456 Mich. 1201 (1997). Respondent filed a petition for writ of certiorari in the United States Supreme Court that was denied on November 10, 1997. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Respondent then filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan. On November 2, 2000, the District Court granted habeas corpus relief and vacated his conviction for first-degree murder on double jeopardy grounds. *Vincent v. Jones*, 98-40007 (E.D. Mich. Nov. 2, 2000). [Pet. App. pp. 78a-83a].

Petitioner Jones appealed to the United States Court of Appeals for the Sixth Circuit. On June 6, 2002, the Court of Appeals entered an opinion affirming the District Court below and on July 2, 2002 the Court issued its

mandate. *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002). [Pet. App. pp. 1a-14a].

JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Sixth Circuit, entered July 2, 2002. *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002). [Pet. App. pp. 1a-14a]. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

28 U.S.C. § 2254 provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

1. Facts relating to the murder

Respondent Vincent, along with two codefendants, was charged with first-degree murder for the gang-related killing of Markeis Jones in the parking lot of a high school in Flint, Michigan. The Michigan Supreme Court summarized the trial evidence:

> The defendant and his two codefendants were charged with open murder and possession of a firearm during the commission of a felony, arising from the shooting death of Markeis Jones. Jones was shot during a confrontation between two groups of youths at Hamady High School in Flint. The defendant and his friends did not attend Hamady, but were waiting for friends who were attending a dance at the high school. In the school driveway the two groups of youths were arguing. There was some pushing and shoving and some verbal threats. Ultimately several shots were fired out of the back of a

Mustang hatchback. Testimony indicated that defendant and codefendant Dameon Perkins fired shots from the back of the car. Codefendant Marcus Hopkins drove the car away as the shots were fired. There is some evidence in the record indicating that the shots missed their intended mark and inadvertently hit Markeis Jones, a friend of the defendants. There is also evidence in the record that the confrontation was gang related, involving rival groups known as "Folks Up" and "Folks Down."

All three young men were charged with open murder and felony firearm and were tried before two separate juries during one trial. Defendant Vincent and codefendant Hopkins were tried by one jury, while codefendant Perkins was tried by a second. [*People v. Vincent*, 455 Mich. 110, 112-113 (1997); Pet. App. p. 27a].

2. Facts relating to the double jeopardy claim

A. March 31, 1992

On March 31, 1992, following the close of the state's case-in-chief, counsel for all three defendants moved for directed verdicts of acquittal on the charge of first-degree murder. Counsel argued that there was insufficient evidence of premeditation and deliberation and that the shooting was unplanned and spontaneous. [Joint App. pp. 4-8]. The prosecutor opposed the motion. [Joint App. pp. 8-12].

The trial court judge initially indicated that his "impression" was that second-degree murder was the appropriate murder charge but he later agreed to give

further consideration to the charge the next day to allow the prosecutor to research the issue:

> THE COURT: Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then [sic] anyone else as I hear the comment made by Mr. Doll [counsel for Perkins] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay. [Joint App. pp. 12-13].
>
> * * *
>
> MR. STAMOS: When the juries come back tomorrow can I make a brief restatement in terms of the First Degree Murder . . .
>
> THE COURT: Yes, I'll be glad to hear it. Sure. I'm always glad to hear people.
>
> MS. CUMMINGS: So that means we have to be here at eight thirty then?
>
> THE COURT: I assume so, yes. If he wants to make a statement it should apply to everybody.

MR. STAMOS: Yes, I'd just like to look up, find some law.

THE COURT: That's fine. I'm glad to hear you. Whatever you want to do is fine with me. [Joint App. p. 18].

The above discussion took place out of the presence of the jury.

B. April 1, 1992

The following morning, April 1, 1992, the prosecutor argued that there was more than sufficient evidence to survive a motion for directed verdict on the first-degree murder charges. [Joint App. pp. 21-32]. Defense counsel took the position that the court had already directed a verdict resulting in a final judgment of acquittal on the first-degree murder charges and that double jeopardy prohibited the case from going forward on the charge of first-degree murder. [Joint App. pp. 32-40]. The trial court stressed that the jury had not been informed of any ruling and the trial court judge was of the opinion that he had made no dispositive ruling and was thus free to consider the prosecutor's argument on the first-degree murder charge without jeopardy terminating. In response to defense counsel's argument to the contrary, the trial court judge said:

THE COURT: Do you really believe that? You think that when a decision is made that before it's recited to the parties who are directly involved in it and particularly the jury we're asking now for the jury not to consider certain factors that might be brought to them, that a court cannot consider things in great length and

I, I try to be an open person, I try to give everybody an opportunity to talk and to say any thing they want. And I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible. [Joint App. p. 34].

* * *

THE COURT: You think double jeopardy has anything to do with this?

MS. CUMMINGS: Yes. I believe once you've directed. A verdict –

THE COURT: Why is that?

MS. CUMMINGS: A verdict that that's . . .

THE COURT: I haven't directed a verdict to any body.

MS. CUMMINGS: You granted our motion.

THE COURT: Oh, I granted a motion but I have not directed a verdict. [Joint App. p. 36].

* * *

Well, I'm going to consider the argument that counsel has made. And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Court's ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve a ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it.

Now I'm basing, of course, the decision upon what we have up until such a time as the

> motion's been made. But I'll reserve the ruling. [Joint App. pp. 42-43].

The trial then continued. Respondent testified, as did another witness. [Pet. App. pp. 5a, 16a].

C. April 2, 1992

The next morning, April 2, 1992, the trial judge stated that he had considered all of the arguments on the first-degree murder charge and would submit the first-degree charge to the jury:

> THE COURT: I've reconsidered the ruling of the Court earlier made and I've decided to let the jury make its own determination on the degrees. That's where we'll stand now so we'll let them have all those issues submitted to them, First, second, Manslaughter and you can go on from there. [Joint App. pp. 45-46].

The jury convicted Respondent Vincent of first-degree murder, [M.C.L. 750.316] and felony firearm, [M.C.L. 750.227b]. [Pet. App. pp. 2a, 14a]. Codefendant Dameon Perkins was convicted by the same jury of second-degree murder and felony firearm. Codefendant Marcus Hopkins was convicted by a separate jury of involuntary manslaughter and felony firearm. [Pet. App. pp. 3a, 14a-15a].

3. State court trial proceedings

The Michigan Court of Appeals vacated Respondent Vincent's first-degree murder conviction and reduced it to second-degree murder on double jeopardy grounds. *People v. Vincent*, 215 Mich. App. 458, 546 N.W.2d 662 (1996). [Pet. App. 14a-25a]. Leave to appeal to the Michigan

Supreme Court was granted and that Court reversed and ordered reinstatement of Respondent's first-degree murder conviction. *People v. Vincent*, 455 Mich. 110, 565 N.W.2d 629 (1997). [Pet. App. 26a-51a].

Respondent's petition for a *writ of certiorari* was denied by the United States Supreme Court on November 10, 1997. *Vincent v. Michigan*, 522 U.S. 972 (1997).

4. Federal court trial proceedings

On January 8, 1998, Vincent sought a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan. In his petition, Vincent contended the Michigan Supreme Court's conclusion that an oral grant of a directed verdict not reduced to writing was insufficient to terminate jeopardy was contrary to, or an unreasonable application of, United States Supreme Court precedent. The case was referred to the magistrate judge who recommended granting the writ. [Pet. App. p. 76a]. The District Court, Gadola, J., considering the matter *de novo*, found that the statements of the trial court were sufficient to rise to the level of an acquittal of the first-degree murder charge under United States Supreme Court precedent and that continuation of the trial constituted a violation of the Double Jeopardy Clause of the Fifth Amendment. [Report and Recommendation of Magistrate; Pet. App. pp. 52a-77a]. See, Opinion and Order granting habeas corpus. [Pet. App. pp. 78a-83a].

Petitioner Jones appealed to the United States Court of Appeals for the Sixth Circuit. On June 6, 2002, the Sixth Circuit Court of Appeals affirmed the district court and held as a matter of law that the statements of the trial judge constituted a directed verdict of acquittal such that

jeopardy attached, and that the trial court could not reverse that decision later in the trial and permit the case to go to the jury for decision. The court said it was irrelevant whether the trial judge informed the jury of his decision. The Sixth Circuit found that the state trial judge made a determination that there was insufficient evidence of first-degree murder and that by later submitting the case to the jury on the charge of first-degree murder, petitioner's rights under the Double Jeopardy Clause had been violated. [Pet. App. pp. 1a-12a]. The Court of Appeals issued its Mandate on July 2, 2002. [Pet. App. p. 13a]. Petitioner filed for *certiorari* and requests reversal of the Sixth Circuit's grant of habeas relief and reinstatement of Respondent's conviction and sentence for first-degree murder.

On January 10, 2003, the United States Supreme Court granted *certiorari* in this case to answer the questions: 1. Whether the Michigan Supreme Court's conclusion that the trial court did not direct a verdict of acquittal is a factual finding entitled to deference on habeas corpus review, and, 2. Whether defendant Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first-degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

SUMMARY OF THE ARGUMENT

Argument I:

"The Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA), 28 U.S.C. § 2254(a), requires a federal

court reviewing a state prisoner's habeas corpus claims to focus on the state court's decision to deny relief and to give high deference and demands that the state be given the benefit of the doubt. *Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002). The writ may issue only if the state court's consideration of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or was based on an "unreasonable determination of the facts in light of the evidence presented," 28 U.S.C. § 2254(d)(2).

In this case, the Michigan Supreme Court decided Respondent's claim on a purely factual basis, finding as a matter of fact that the trial court did not grant the motion for directed verdict and, for that reason, did not violate his rights under the Double Jeopardy Clause of the Fifth Amendment. The Sixth Circuit Court of Appeals erroneously reviewed the trial court's statements *de novo* and resolved a factual dispute contrary to the resolution by the Michigan Supreme Court without application of the standard of review mandated by the AEDPA and by this Court's decisions.

Argument II:

Applying the standard of review mandated by § 2254(d)(1), the Sixth Circuit was entitled to affirm the district court's grant of the writ only if the state court's decision was contrary to, or an unreasonable application of, this Court's clearly established law. This Court's cases simply do not clearly establish that double jeopardy prohibits a state trial judge from correcting the erroneous

grant of a motion for directed verdict where the jury was not informed or discharged and no further trial proceedings were conducted between the grant and the court's reconsideration and withdrawal.

This Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), that the "contrary to" and "unreasonable application" clauses have independent meaning. A state court decision will be "contrary to" this Court's clearly established precedent if the state court either applies a rule that contradicts the governing law set forth in the court's cases, or confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from the Court's precedent. *Id.* at 405-06. When a decision is not contrary to United States Supreme Court law, the habeas court must consider it under the unreasonable application clause. *Early v. Packer*, ___ U.S. ___, 154 L.Ed.2d 263, 271, 123 S. Ct. 362, 366 (2002).

No case from this Court has considered the issue presently before the Court: whether a directed verdict becomes an acquittal terminating jeopardy either in the moment when a motion for directed verdict is granted, when such a ruling is reduced to writing and entered upon the record, or not until the jury is so directed. Thus, the Michigan Supreme Court's decision did not unreasonably apply any United States Supreme Court precedent.

In a criminal case, a trial judge may, without violating the Double Jeopardy Clause of the Fifth Amendment, correct an erroneous grant of a defendant's motion for directed verdict where the jury was not informed of the grant or discharged from service and no further trial

proceeding were conducted between the grant and the court's corrective action.

In this case, the Respondent was only tried once and did not incur any prejudice whatsoever due to the trial court's conduct. Indeed, there were no proceedings between the time the trial court granted the motion at the end of one day and then withdrew its grant the next morning.

Clearly, a rule that a defendant is acquitted as soon as granting words are spoken is both unjust and unworkable. Furthermore, the rule would be unnecessary to protect the interest that the Double Jeopardy Clause was designed to protect. Should this Court reach the issue, the Court should hold that jeopardy does not attach until the defendant incurs some material prejudice, i.e., where the proceedings continue to the detriment of the defendant or the ruling is conveyed to the jury.

The state court's decision was neither contrary to nor an unreasonable application of clearly established United States Supreme Court law. Moreover, the actions of the trial court did not violate the Double Jeopardy Clause of the United States Constitution.

ARGUMENT

I. The Sixth Circuit Court of Appeals failed to afford the deference mandated by "The Antiterrorism and Effective Death Penalty Act of 1996" to the Michigan Supreme Court's factual finding, that the trial court had not granted Respondent Vincent's motion for directed verdict of acquittal.

This case involves the exercise of the federal court's habeas corpus jurisdiction to review the legality of a state prisoner's custody to determine whether he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). Petitioner contends that the United States Sixth Circuit Court of Appeals failed to apply the deferential standard of review mandated by the amendments to the federal habeas statute contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(a). The Sixth Circuit's *de novo* review and affirmance of the district court's grant of habeas corpus relief failed to afford the state court's decision the deference mandated by the statute and by this Court.

As amended, Section 2254 of Title 28, United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (3) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (4) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA effected a dramatic change in habeas corpus law by requiring a federal court reviewing a state prisoner's claims to focus its attention squarely on the state court's decision to deny relief. The statute imposes a highly deferential standard for evaluating state court rulings, and demands that the state be given the benefit of the doubt. *Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002). The double jeopardy claim in Respondent Vincent's habeas petition is the same claim rejected on direct appeal by the Michigan Supreme Court. Although the Sixth Circuit panel correctly recognized the applicability of § 2254(d), it failed to apply the standard of review mandated by the amended statute.

The Sixth Circuit recited the language of § 2254(d) and characterized the interpretation outlined by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000) as follows: "[A] writ may issue if the state court applied a legal rule that contradicts United States Supreme Court precedent, or if the state court applied the correct legal rule but its application of the rule to the facts of the case was objectively unreasonable." *Vincent v. Jones*, 292 F.3d 506, 510 (6th Cir. 2002) [Pet. App. p. 8a]. Despite the Sixth Circuit's apparent recognition of the governing standard, however, the Sixth Circuit considered Respondent's claim *de novo*, reviewing the statements made by the trial court judge to determine whether that court had granted the motion for directed verdict, and whether the "statements and actions constituted a resolution of some or all of the factual elements of the offense charged such that jeopardy

attached." *Id.* at 512 [Pet. App. p. 12a] citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). The Sixth Circuit incorrectly opined that, "We are not bound by the holdings of the Michigan Supreme Court that the trial judge's statements did not constitute a directed verdict under Michigan law. Instead, we must examine the state trial judge's comments to determine whether he made a ruling which resolved the factual elements of the first-degree murder charge." *Vincent,* 292 F.3d at 511. [Pet. App. 10a]. The panel appeared to believe that, in spite of the restrictions of the habeas standard, this Court's decisions in *Martin Linen* and *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) required it to conduct *de novo* review of the statements of the trial judge to determine whether the court had granted an order constituting an acquittal.

When exercising habeas corpus jurisdiction, it is necessary for the federal courts to determine whether the state court resolved the question upon a purely factual basis, or as a matter of law, or on the basis of mixed law and fact. If the state court resolved the question solely upon a resolution of factual issues, the habeas court's task under § 2254(d)(2) is to determine whether the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2).

In this case, the Michigan Supreme Court decided Vincent's claim on a purely factual basis, finding as a matter of fact that the trial court did not grant the motion for directed verdict and, for that reason, did not violate Respondent's rights under the Double Jeopardy Clause:

> We reverse the decision of the Court of Appeals and hold, on the basis of the following evaluation, that the judge's inchoate impressions

> did not mature into a final judgment of acquittal of the charge. Consequently, Vincent's right not to be placed twice in jeopardy was not violated.
>
> * * *
>
> A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. This concept finds support in our own court rules. MCR 2.602(A) requires that judgments and orders be "in writing, signed by the court and dated with the date they are signed." **None of the indicia of formality associated with final judgments are present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all.** "Okay" does not equate with "It is so ordered." Further, we note that the trial court **did not substantially comply with the requirement** of MCR 6.419(D) **that provides "[t]he court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal. . . . "** As we stated in part II(B), the loose impressions of the judge cannot be construed as an adequate evaluation of the evidence. Instead, it reflects a tentative conclusion, not a formal resolution on the factual elements of the offense charged.
>
> **There was nothing to indicate that the judge's impression in this case was anything more than an initial assessment of a possible future ruling.** *People v. Jackson*, 232 AD2d 193; 647 NYS2d 764 (1996). Similarly there was nothing to indicate that this was anything more than a continuing discussion between

the parties. *State v. Newfield*, 161 Ariz. 470, 472; 778 P.2d 1366 (Ariz. App. 1989). Further, we are inclined to agree with a decision of the United States Court of Appeals for the Second Circuit holding that a judge's decision to submit the charge to the jury implicitly denies the motion. *United States v. Bruno*, 873 F.2d 555, 562 (2nd Cir. 1989).

The fact that the judge decided to entertain additional arguments the next day is further indication that he had not made a final decision. We are aware that how the judge characterizes his statement is not controlling, or is the form of the so-called ruling controlling, but in this case we find that the judge was correct. He had not directed a verdict. Statements couched in the terms "my impression," "I think," "in the event that it's not our premeditation planning episode," and "[i]t may very well be," do not resound in finality. To the contrary they are clearly equivocal. **We would be hard pressed to call that kind of indecisive pondering a final judgment of acquittal.**

We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold

> that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights. [*People v. Vincent,* 455 Mich. 110, at 118, 125-127 (emphasis added)] [Pet. App. pp. 33a, 40a-42a].

Thus, the Michigan Supreme Court resolved the double jeopardy claim by rejecting the necessary factual predicate to Respondent's claim: that a motion for directed verdict was granted at all. The double jeopardy claim in this case involves two distinct questions. The first question is whether an order for directed verdict was granted by the trial court. That question is factual. The second question is, if so, whether the order was an acquittal for purposes of the Fifth Amendment's Double Jeopardy Clause. The second question is a matter of law.

The lower federal courts advanced two related bases for rejecting the state's contention that the Michigan Supreme Court's decision was based on a determination of a factual issue. First, the federal courts relied on the holding of *Smalis* that a state appellate court's characterization of a trial court's order is not binding on a federal court considering a double jeopardy claim. Second, the courts concluded that because the statements made by the trial judge were a matter of record, and therefore undisputed, the state court's conclusion that those statements did not grant a directed verdict was not the resolution of a factual dispute.

The federal court failed to perceive a dispositive distinction between the question presented in this case

and the question presented in *Smalis*. In *Smalis*, the trial court found that the prosecutor had not presented sufficient evidence to find the defendants guilty beyond a reasonable doubt, and granted a "demurrer" pursuant to Pennsylvania law. In concluding that the court's order was subject to appeal by the prosecution, the Pennsylvania Supreme Court held that a demurrer was not an acquittal for purposes of the Double Jeopardy Clause. On direct appeal, this Court held that it was not bound by the state court's conclusion that a demurrer was not an acquittal.

The *Smalis* Court considered the preclusive effect of a certain kind of state court order. The Court did not address the antecedent factual question – whether an order was granted at all. If the Michigan Supreme Court in this case had held that *a directed verdict is not an acquittal, Smalis* would be clearly on point. That is not what the Michigan court held, however. The Michigan Supreme Court's decision was that *the trial court had not granted the defendant's motion for directed verdict*. If there had been a dispute in *Smalis* similar to the question here, this Court would have found it necessary to consider first whether an order had been made, and only then would the Court have reached the issue of the legal import of the order relative to double jeopardy. Because there was no dispute as to the first question, that issue was not separately discussed but was simply assumed. It was manifestly clear, not only from the proceedings below, but also from the statements of the Court that a dispositive order had been granted:

> "We hold, therefore that *the trial judge's granting of petitioner's demurrer* was an acquittal under the Double Jeopardy Clause, and that the Commonwealth's appeal was barred because reversal

> would have led to further trial proceedings." [*Smalis, supra*, 476 U.S. at 145]

In contrast, the instant case presents exactly the opposite situation. The dispute here centers on the threshold question: Whether an order granting a motion for directed verdict was made. There was no contention in this case that a directed verdict is not an acquittal, the Michigan Supreme Court unequivocally stated that it is. *Vincent, supra*, 455 Mich. at 119-120. [Pet. App. pp. 34a-35a]. *Smalis* clearly does not support the conclusion that the federal court was required to conduct *de novo* review of the Michigan Supreme Court's factual decision that the order had not been granted.

It was also the view of the district court and the Sixth Circuit panel that, because the trial judge's remarks themselves were not in dispute, the conclusion that the Michigan Supreme Court drew from its review of those remarks, i.e., whether or not an order was granted, could not have been a factual finding. This rationale was simply stated in conclusory fashion by both courts without discussion. *Vincent,* 292 F.3d at 511. [Pet. App. p. 12a]. This Court, however, has held that a state appellate court's determination of what a trial judge found upon consideration of ambiguous comments by the lower court is a conclusion of historical fact.

The question whether an appellate court's interpretation of a trial judge's ambiguous remarks is a finding of fact or an issue of law, was resolved by this Court in *Parker v. Dugger*, 498 U.S. 308, 320 (1991):

> In *Wainwright v. Goode*, 464 US 78, 83-85 (1983), the Court held that a federal court on habeas review must give deference to a state

> appellate court's resolution of an ambiguity in a state trial court statement. We did not decide in *Goode* whether the issue resolved by the state appellate court was properly characterized as one of law or of fact. In this case, we conclude that *a determination of what the trial judge found is an issue of historical fact*. It depends on an examination of the transcript of the trial and sentencing hearing and the sentencing order. [emphasis added]

In this case, the Michigan Supreme Court clearly examined the trial transcripts and resolved ambiguities in the trial court's statements. The state court's factual determination that there was no order granting the motion for directed verdict was therefore entitled to the deference mandated by the habeas statute. This was true under *Parker,* decided with reference to pre-AEDPA law, and under the 1996 habeas amendments, which substantially increased the deference to be accorded to state court decisions. *Williams v. Taylor*, 529 U.S. at 412. Under the AEDPA, the federal court was without authority to grant relief in this case on the basis of its mere disagreement with the Michigan Supreme Court's resolution of the ambiguous statements of the trial court. Mere disagreement by the federal court with the state court's decision will not support habeas relief:

> In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application

> must also be unreasonable. [*Williams v. Taylor*, 529 U.S. at 411]

There is no reason to suppose that Congress intended a different meaning of the word "unreasonable" as it was used with regard to factual conclusions in § 2254(d)(2).

The Sixth Circuit Court of Appeals characterized this case as requiring determination of a legal question and not a factual question. But the panel then proceeded to resolve both questions without acknowledging that it was doing so. The court initially considered, *de novo*, the factual question: whether the trial judge had granted the motion for directed verdict. The court stated, "we must examine the state trial judge's comments to determine *whether he made a ruling* which resolved the factual elements of the first-degree murder charge." *Vincent,* 292 F.3d at 511. [Pet. App. p. 10a]. "A review of the trial transcript reveals that *the trial judge initially granted the motion* for directed verdict through his statements at the end of the day March 31, 1992." *Id.* "*Our conclusion that the trial judge granted the motion* is warranted by the precise language he used." *Id.*

Only after substituting its own factual determination regarding the grant of a motion for directed verdict did the panel proceed to resolve a second, legal issue.

> We now address whether the above statements and actions constituted a resolution of some or all of the factual elements of the offense charged such that jeopardy attached. *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977). We find that when the trial judge granted the motion for directed verdict on March 31, 1992, his actions constituted a grant of an acquittal on the first-degree murder charge such

that jeopardy attached. [*Id.* at 512; Pet. App. p. 12a]

The Sixth Circuit Court of Appeals erroneously reviewed the trial court's statements *de novo* and resolved a factual dispute contrary to the resolution by the Michigan Supreme Court without application of the standard of review mandated by the habeas corpus statute and by this Court's decisions. That standard of review required acceptance of the state court's finding that there was no order of directed verdict unless the habeas courts determined that this decision was an unreasonable determination of the facts in light of the evidence presented in state court.

The state court factual determination that there was no grant of the motion for directed verdict was reasonable in light of the evidence presented in state court. The trial court's statements reveal a number of ambiguities. Responding to the motion for directed verdict, the court began its colloquy with, "Well, my impression at this time is" . . . . The court then made two statements: "that there's not been shown premeditation or planning in the alleged slaying," and "that what we have at the very best is second-degree murder." Because the court's second sentence began with the word, "that", it could easily be concluded that the words, "my impression at this time" were meant to apply to both statements. Such equivocation is clearly not indicative of a final order. The court's final statement, "and I think that second-degree murder is an appropriate charge as to the defendants. Okay." is also equivocal because of the words, "I think". [Pet. App. pp. 3a, 28a]. The Michigan Supreme Court referred to the ambiguous nature of the trial judge's language:

> Statements couched in the terms "my impression," "I think," "in the event that it's not our premeditation planning episode," and "[i]t may very well be," do not resound in finality. To the contrary they are clearly equivocal. We would be hard pressed to call this kind of indecisive pondering a final judgment of acquittal. [455 Mich. at 126 (footnote omitted)] [Pet. App. p. 41a].

Shortly before the proceedings were adjourned for the day, the prosecutor asked, "When the juries come back tomorrow can I make a brief restatement in terms of the first-degree murder . . . ". The court replied, "Yes, I'll be glad to hear it. Sure. I'm always glad to hear people." [Joint App. p. 18]. Clearly, entertaining further argument on the question is inconsistent with a final order having been made.[2]

---

[2] The statements of the trial judge in this case were considered four times by Michigan appellate courts. Petitioner's two co-defendants were denied relief in separate opinions in the Michigan Court of Appeals. In co-defendant Hopkins' appeal, the court stated as follows:

> While the court expressed an opinion that ultimately would have ripened into a final ruling had nothing intervened and the court taken the issue from the jury, the court, before acting on its expressed opinion, agreed to hear further argument from the prosecutor regarding the issue. When the court recessed for the day, everyone was aware that the prosecutor was going to present further argument on the issue of first-degree murder the next morning, before defendants would proceed with their cases. The matter was addressed the next morning, and the court reconsidered its opinion earlier expressed, concluding that it would reserve ruling. Thus, the record indicates that the court expressed an opinion, and then before finalizing that opinion, agreed to entertain further argument. The court did not make a final ruling until it denied defendant's motion for directed

(Continued on following page)

The Michigan Supreme Court was clearly resolving ambiguities in the trial court's statements to determine whether the motion for directed verdict was granted on March 31. In a motion for rehearing in the Michigan Supreme Court, Respondent's counsel presented to the court, for the first time, a docket entry for March 31, 1992 from the Genesee County Circuit Court stating that motions for directed verdicts had been granted. Because it was not timely presented, it was not discussed in the Michigan Supreme Court's opinion. Although the Court had stated in a footnote that a docket entry, among other things, "might be considered in evaluating finality," the Court declined to reopen the case on Respondent's motion

verdict and submitted the case to the jury. We conclude the court was not barred from further consideration of the matter. [Unpublished opinion per curiam, issued October 20, 1995 (Docket No. 158133), slip op at 2.] [*People v. Vincent*, 455 Mich at 116]

In co-defendant Perkins' case, the Court of Appeals held that "[s]ince the trial court had never indicated to the jury that it was directing a verdict of acquittal on first-degree murder, there was no prejudice to defendant and, more importantly, defendant's double jeopardy rights were not violated. *Id.* at 117.

The Court of Appeals panel hearing Vincent's case reversed his conviction, finding that, although the trial judge's first statement, "Well, my impression at this time," was ambiguous, the later statement, "What we have at the very best is second-degree murder," was not. 215 Mich. App. 458, 468 (1996). The Michigan Supreme Court reversed, finding that the court's remarks were "inchoate impressions" that did not "mature into a final judgment." 455 Mich. at 118.

Thus, sixteen Michigan appellate judges have considered the same statements and reached different conclusions as to whether a motion was granted. Such an array of legal analysis resulting in differing conclusions would seem sufficient without more to establish that the court's remarks were ambiguous, and that a conclusion going in either direction would suffice as a reasonable one under § 2254(d)(2).

for reconsideration.[3] Docket entries in Michigan courts do not conform to the requirements for an order. *People v. Kelley*, 181 Mich. App. 95, 97-98, 449 N.W.2d 109 (1989). Moreover, the fact that the docket entries indicate neither the taking of the motion under advisement on April 1 nor the final denial on April 2 clearly demonstrates the unreliability of the docket entries as conclusive evidence of what occurred in court.

The Michigan Supreme Court's decision that Petitioner's rights under the Double Jeopardy Clause were not violated was based on a reasonable determination of the facts in light of the evidence presented. Because the Sixth Circuit Court of Appeals failed to recognize that the state court decision was based on a factual determination and failed to apply the correct standard of review, the court erred in its affirmance of the district court's grant of relief. The decision of the Court of Appeals must be reversed.

[3] In his brief in opposition to the petition for certiorari in this Court, Respondent's counsel stated, "In this case, of course, the trial judge did reduce his grant of directed verdict to writing by recording it in the formal docket entries for March 31, 1992." (Brief in Opposition to Petition, p. 16) Counsel made the same claim in his brief in the Court of Appeals. At oral argument in the Sixth Circuit, upon questioning by the court, counsel admitted that he had no evidence whatsoever that the docket entry was made by the trial judge.

II. Where a state trial court reconsidered and corrected its own erroneous grant of a motion for directed verdict to a criminal defendant in a jury trial and where: (1) the jury has neither been informed nor discharged; and (2) no trial proceedings were conducted between the grant of the motion and the withdrawal of the grant; A. The trial court's conduct is not contrary to, or an unreasonable application of, clearly established United States Supreme Court law, and; B. There is no constitutional double jeopardy violation.

A. The trial court's conduct was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law.

Even if the issue decided by the Michigan Supreme Court is viewed as whether the trial judge's statements constituted an acquittal rather than whether the trial judge issued an order, the Sixth Circuit's decision failed to apply the standard mandated by the habeas statute and by this Court, and erroneously affirmed the grant of relief in this case. For purposes of this issue, Petitioner will assume, *arguendo*, that the trial court granted the motion for directed verdict and then, subsequently, withdrew the grant the next morning prior to the continuation of any proceedings in the case.

If the motion was granted, the grant occurred at the end of the day on March 31, 1992 and was clearly withdrawn the following morning, when the judge stated that

he would reserve his ruling on the motion.[4] The trial court considered defendant's objection and concluded that double jeopardy did not prevent the continuation of the trial on the first-degree murder charge. The trial court stated, "Oh I granted a motion but I have not directed a verdict." [Joint App. p. 36]. The court also referred several times to its previous "ruling", as the Court of Appeals noted. [Pet. App. p. 11a]. It is clear from the record that it was the trial judge's position that the Double Jeopardy Clause did not prevent him from reconsidering the grant of a motion for directed verdict since he had not informed the jury of his ruling. The trial court clearly believed that the grant of a motion for directed verdict does not constitute an acquittal for double jeopardy purposes until the jury is so informed. Applying the standard of review mandated by § 2254(d)(1), the Sixth Circuit was entitled to affirm the district court's grant of the writ only if the state court's decision was contrary to, or an unreasonable application of, this Court's clearly established law. This Court's cases simply do not clearly establish that double jeopardy prohibits a state trial judge from correcting the erroneous grant of a motion for directed verdict where the jury was not informed or discharged and no further trial proceedings were conducted between the grant and the court's reconsideration and withdrawal.

---

[4] Respondent has argued throughout these proceedings that the court's alleged grant of the motion was not "reversed" until shortly before the jury was instructed. To the contrary, if there was a grant of the motion, it was withdrawn the following morning, before any further trial proceedings were conducted, when the judge reconsidered, entertained argument on the double jeopardy issue, and stated that he would reserve his ruling. [Joint App. pp. 42-43].

Clearly established Supreme Court precedent

This Court has refined the scope of the prohibition against government appeals under the Double Jeopardy Clause. It does not preclude an appeal where a post-verdict ruling appealed by the prosecution would not necessitate a second trial of the defendant and a successful governmental appeal would simply reinstate the guilty verdict. *United States v. Wilson*, 420 U.S. 332, 353 (1975). Also the mid-trial dismissal on procedural grounds prior to submission to the jury does not preclude a government appeal. *United States v. Scott,* 437 U.S. 82, 86-87 (1978). The purpose of the Double Jeopardy Clause was to prevent successive trials. *Wilson,* 420 U.S. at 353.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Court affirmed the denial of a government appeal. The case involved a judgment of acquittal issued by the trial court after a deadlocked jury had been discharged. The Court noted that the constitutional principle underlying the Double Jeopardy Clause was the prohibition against multiple trials and said that "the most fundamental rule in the history of double jeopardy law has been that a verdict of acquittal . . . could not be reviewed." *Id.* at 571. quoting *United States v. Ball*, 163 U.S. 662, 671 (1896). The Court also discussed the importance of the role of a judgment of acquittal in protecting defendants against a deficient prosecution. The Court explained that a second trial caused by the state's appeal of a judgment of acquittal following a hung jury differed from a retrial of a defendant following a hung jury because in the former situation, the defendant had been "acquitted." The Court declared that a retrial may be permissible following a mistrial without a verdict, whereas a retrial is not permitted once the verdict has been rendered. *Id.* at 575-576. The Court

concluded that the trial court's ruling was an acquittal "in substance as well as form", thus, an appeal by the prosecution was prohibited under the *United States v. Fong Foo,* 369 U.S. 141 (1962) decision. *Id.* at 571-572.

In 1986, this Court decided *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) and unanimously held that a trial court's granting a demurrer based on insufficiency of the evidence in a bench trial constitutes a non-appealable acquittal for double jeopardy purposes. The decision prohibited an appeal by the state since further trial proceedings would have been required. On completion of the state's case in a non-jury trial, the trial judge sustained the defendant's demurrer challenging the sufficiency of the prosecution's evidence. The Superior Court of Pennsylvania found the decision unreviewable. The Pennsylvania Supreme Court reversed, holding that the appellate courts could review the case because the granting of a demurrer is not the functional equivalent of an acquittal, and because it was the defendant's choice to request a dismissal on those grounds. In a unanimous opinion, this Court disagreed and concluded that the Double Jeopardy Clause precluded the prosecution's appeal. This Court said that a demurrer constituted an acquittal because the trial judge ruled as a matter of law that the prosecution lacked evidence to establish factual guilt. It was thus held that "the trial judge's granting of petitioner's demurrer was an acquittal under the Double Jeopardy Clause, and [therefore] the Commonwealth's appeal was barred because reversal would have led to further trial proceedings." *Id.* at 146.

Federal habeas review

Under habeas review, the state court's ruling was not contrary to, or an unreasonable application of, the foregoing Supreme Court precedent. The United States District Court and the Sixth Circuit in this case were without legal authority to grant Respondent Vincent's petition with respect to any matter that the Michigan Supreme Court adjudicated on the merits unless the state court's determinations were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). With respect to the law governing § 2254(d)(1), "contrary to" established Supreme Court precedent means "substantially different from the relevant precedent." "A state-court decision is 'contrary to' our clearly established precedents, if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Early v. Packer*, ___ U.S. ___, 123 S. Ct. 362, 365, 154 L.Ed.2d 263, 271 (2002).

The only definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. *Williams v. Taylor,* 529 U.S. 362, 412 (2000). This Court has stated that § 2254(d)(1) imposes a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy,* 521 U.S. 320, 333 n. 7 (1997), and "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002).

This Court explained in *Williams*, that the "contrary to" and "unreasonable application" clauses have independent meaning. A state court decision will be "contrary to" this Court's clearly established precedent if the state court either applies a rule that contradicts the governing law set forth in the court's cases, or confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from the Court's precedent. *Id.* at 405-406. Respondent claims that the state court's decision in this case is contrary to *Smalis* because further trial proceedings in this case were conducted following the grant of an order which acquitted the defendants. But the argument fails to address the threshold question of acquittal. Assuming the motion was granted, did it acquit the defendant then and there? Or would an acquittal occur only when the order was executed by an instruction or some notification given to the jury regarding first-degree murder? *Smalis* did not address that question.

This case and *Smalis* clearly cannot rationally be termed "materially indistinguishable." *Smalis* involved the question whether a certain kind of order by the trial court was an acquittal. The present case involves the question whether a directed verdict is an acquittal as soon as an order is granted, or not until a written order is entered or until the jury is instructed in accordance with its terms. *Smalis* involved a bench trial and a prosecutor's attempt to appeal, while the present case involves a jury trial and reconsideration of his own order by a trial judge prior to any further proceedings. In *Smalis,* trial proceedings would have been re-initiated years later if the prosecutor's appeal was successful. In the present case, the trial was

not interrupted. Clearly the cases are materially distinguishable, and the state court's decision was not "contrary to" *Smalis*.

This leaves open the question, therefore, whether the trial judge unreasonably applied this Court's established double jeopardy rules when he concluded that his oral grant of the defendant's motion did not terminate jeopardy because it had not been communicated to the jury. If a decision is not contrary to United States Supreme Court law, the court must consider it under the unreasonable application clause. *Early,* 123 S. Ct. at 366.

In a jury trial, jeopardy attaches when the jury is sworn. *United States v. Serfass*, 420 U.S. 377, 388 (1975). Jeopardy terminates when the jury is discharged. *Green v. United States*, 355 U.S. 184, 191 (1957). There are at least three conceivable points at which jeopardy could be held to terminate by acquittal in a jury trial. The first is upon the utterance of words by a trial judge granting a motion for an order of acquittal. The second is upon the court's instruction to the jury that it is not to consider the charge in question. The third is upon the jury's discharge.

Respondent argues for the first point – the moment an order is granted, but can cite to no case decided by this Court that so holds, or that even comes close enough to be applied to the question. If this Court had granted *certiorari* to Vincent on direct appeal, it might have rendered a decision more clearly defining the point at which a criminal defendant is acquitted by a directed verdict in a jury trial. On habeas review the question is whether the state courts unreasonably applied this Court's precedents. *Penry v. Johnson*, 532 U.S. 782, 794-795 (2001). The standard is highly deferential and demands that the state be given the

benefit of the doubt. *Woodford v. Visciotti*, ___ U.S. ___, 123 S. Ct. 357, 360, 154 L.Ed.2d 279 (2002).

Citing *Smalis*, the Sixth Circuit held that the determination whether the trial court's statement was an acquittal was a federal question and not a factual question as Petitioner had argued. But the conclusion that the Michigan Supreme Court decided a federal question does not support the Sixth Circuit's abandonment of the standard of review mandated by the AEDPA. The federal court's habeas jurisdiction *requires* a petitioner to raise a federal question. 28 U.S.C. § 2254(a). The Court of Appeals' declaration, "We are not bound by the holding of the Michigan Supreme Court," and subsequent *de novo* review, was fundamentally erroneous.

Because no case from this Court has considered the issue here – whether a directed verdict becomes an acquittal terminating jeopardy when a motion is granted or not until the jury is so directed – the Michigan court's decision did not unreasonably apply any Supreme Court case.

The Michigan Supreme Court in this case [*People v. Vincent*, 355 Mich. at p. 118, fn. 4; Pet. App. p. 33a] was fully cognizant of the fact that there is no clearly established United States Supreme Court decision holding that a grant of a directed verdict of acquittal, which is reconsidered by the trial court and reversed prior to commencement of further trial proceedings, and never communicated to the jury, violates the Fifth Amendment prohibition against double jeopardy. The Michigan Supreme Court expressly acknowledged the principles articulated in *Martin Linen*, and *Smalis*. *Vincent,* 456 Mich. at 121 [Pet. App. p. 36a]

Cases from various jurisdictions on facts similar to the facts in this case demonstrate that if a rule has been clearly established by this Court, it is not apparent to many of the country's appellate courts.

The recent case of *People v. Williams*, 188 Ill. 2d 293, 721 N.E.2d 524 (1999) is substantially similar to the case at bar. The defendant challenged his armed robbery conviction in the Illinois state court following a bench trial. He had been charged with murder and armed robbery. At the conclusion of the state's case, defense counsel moved for a finding of not guilty on both charges. The judge granted the motion as to the murder charge. After indicating that she was going to grant the motion as to the robbery charge as well, the court reconsidered, asked for legal authority, and ultimately denied the motion. Neither the state nor defendant presented further evidence, and Williams was convicted of armed robbery. Williams argued that the judge's initial pronouncement constituted an acquittal, and her reconsideration violated the Double Jeopardy Clause of the Fifth Amendment.

Williams' double jeopardy claim was raised on direct appeal and rejected by the Illinois Supreme Court with two Justices dissenting. The Illinois Supreme Court accepted that, under Illinois precedent, an unequivocal oral pronouncement could not be reconsidered, but found the judge did not make such a pronouncement. The court concluded that the trial court did not grant the defendant's motion for a directed finding of not guilty as to the armed robbery charged and held that his conviction did not place him in double jeopardy.

Other courts have held that even where there has been an order directing a verdict of acquittal, the order

may be set aside where the jury has not been discharged. *Campbell v. Schroering*, 763 S.W. 2d 145 (Ky. App. 1988). In *State v. Iovino*, 524 A.2d 556 (R.I. 1987) the court, citing *Martin Linen Supply Co.* held that double jeopardy did not preclude a judge from reconsidering the motion. "[T]he distinction . . . lies in the fact that the reconsideration in this case had no effect on the continuance of the trial in which it was made, the jury remained impaneled to adjudicate lesser included charges, and that defendant was not faced with any threat of reprosecution beyond the jury already assembled to hear his case." *Id.* at 559. *See also State v. Sperry*, 149 Ore. App. 690, 699, 945 P.2d 546 (1997) (trial court's oral judgment of acquittal later reversed outside presence of jury held not to violate Fifth Amendment Double Jeopardy Clause); *People v. Jackson*, 647 N.Y.S.2d 764 (1996), *lv. den.*, 654 N.Y.S.2d 726 (1996).

No violation of double jeopardy principles was found in several cases in which the trial judge expressed a willingness to reconsider the motion in the same colloquy in which it was granted, as the Michigan Court did in this case. *United States v. Byrne*, 203 F.3d 671 (9th Cir. 2000), *cert. den.*, 531 U.S. 1114 (2001); *State v. Newfield*, 161 Ariz. 470, 778 P.2d 1336 (1989); *State v. Collins*, 112 Wash. 2d 303, 771 P.2d 350 (1989); *United States v. Baggett*, 251 F.3d 1087 (6th Cir. 2001), *cert. den.*, 534 U.S. 1167 (2002). Other cases have found no violation where the jury was not informed of the grant of a directed verdict. *United States v. Washington*, 48 F.3d 73 (2d Cir. 1995), *cert. den.*, 515 U.S. 1151 (1995) (no violation where jury not informed); *United States v. Lo Russo*, 695 F.2d 45 (2d Cir. 1982), *cert. den.*, 460 U.S. 1070 (1983) (same); *United States v. Rahman*, 189 F.3d 88, 98-102 (2nd Cir. 1999), *cert. den. sub nom Nosair v. United States*, 528 U.S. 982

(1999) (same); *but see United States v. Blount*, 34 F.3d 865 (9th Cir. 1994) (announcement of directed verdict to jury terminated jeopardy, preventing later reinstatement of charges); *Lowe v. State*, 242 Kan. 64, 744 P.2d 856 (1987) (grant of directed verdict may not be withdrawn even where the jury was not informed). Still others have based their conclusions on whether or not the defendant had put on his defense between the grant and its withdrawal. *State v. Blacknall*, 288 N.J. Super. 466, 672 A.2d 1170 (1995) (where defendant had taken the stand in his own defense after grant of motion to dismiss kidnapping charge, court could not reinstate). Not only do these cases support the reasonableness of the Michigan Supreme Court decision, they also demonstrate that this Court has not decided the issue.

B. Respondent was not placed twice in jeopardy by the trial court's actions in this case.

The lower court decisions cited above illustrate the unworkability of a rule that an acquittal occurs the moment words escape a trial judge's mouth reflecting the grant of a directed verdict. Because the erroneousness of an acquittal is immaterial to the double jeopardy question pursuant to *Fong Foo*, even a simple misstatement by a judge could terminate jeopardy under such a rule. By way of example, the appellate courts of Illinois have, in a number of decisions, appeared to adopt the rule the respondent seeks. *People v. Hutchinson*, 26 Ill. App. 3d 368, 325 N.E.2d 115 (1975); *People v. Strong*, 129 Ill. App. 3d 427, 472 N.E.2d 1152 (1984); *People v. Stout*, 108 Ill. App. 3d 96, 438 N.E.2d 952 (1982); *People v. Brown*, 227 Ill. App. 3d 795, 592 N.E.2d 342 (1992).

In *People v. Vilt*, 119 Ill. App. 3d 832, 75 Ill. Dec. 346, 457 N.E.2d 136 (1983), *appeal after remand,* 139 Ill. App. 3d 868, 488 N.E.2d 580 (1985), *cert. den.*, 479 U.S. 864 (1986), the court faced a double jeopardy challenge based on the following dialogue in response to a defendant's motion for directed verdict:

> THE COURT: *That motion will be allowed.*
>
> MR. GERTS (The assistant State's Attorney): May I ask why?
>
> THE COURT: Wasn't any evidence of anal sodomy.
>
> MR. GERTS: I think she testified that – Theresa testified of the contact.
>
> THE COURT: Or am I thinking, am I thinking of the other girl?
>
> MR. GERTS: Tami George there was no anal act with.
>
> THE COURT: I am sorry, I am sorry, I am talking, I am thinking of Tami George, that is right.
>
> MR. GERTS: Tami was in the dress.
>
> THE COURT: *That motion will be denied.*
>
> MR. KIELIAN [defense counsel]: Could I be –
>
> THE COURT: Yes you may be heard on it but I am sorry, I had the wrong, the wrong cases. [*Vilt*, 119 Ill. App. 3d at 833-34 (emphasis added)]

The Appeals Court rejected defendant's double jeopardy claim, distinguishing the preceding cases by stating that the judge in *Vilt* reversed himself "practically in the same breath."

Clearly, a rule that a defendant is acquitted as soon as granting words are spoken is both unjust and unworkable. Further, the rule would be unnecessary to protect the interest that the Double Jeopardy Clause was designed to protect. The underlying purpose of the Double Jeopardy Clause is to protect a defendant from being tried or punished twice for the same offense. *United States v. Wilson*, 420 U.S. 322, 339 (1975). The clause is a "bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent." *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980). But see, *Sattazahn v. Pennsylvania*, ___ U.S. ___, 154 L.Ed.2d 588 (2003), where this Court said " . . . we have not found this concern determinative of double jeopardy in all circumstances."

As stated in Justice Brennan's concurring opinion in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 320 (1984):

> The question of whether jeopardy has objectively "terminated" should be analyzed in terms of the policies underlying the Double Jeopardy Clause, namely, its concern that repeated trials may subject a defendant "to embarrassment, expense and ordeal and [compel] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957). Jeopardy may be said to have terminated only when the posture of a trial in some objective sense leaves the defendant in such a position that resumption of proceedings would implicate those policies.

Because the rule sought by Respondent Vincent is unwise for reasons of public policy, and unnecessary to protect a defendant's double jeopardy rights, and would lead to unjust results, Petitioner urges this Court to hold that Respondent's double jeopardy rights were not violated.

CONCLUSION

In this case, the Sixth Circuit Court of Appeals was called upon to review, on habeas corpus, the decision of a state court which made a careful, reasoned attempt to apply this Court's precedents regarding double jeopardy to the facts of the case before it. Although this Court, in *Williams v. Taylor*, provided guidelines for the application of the deferential review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 in just such circumstances, the Court of Appeals failed. It offered no deference to the Michigan Supreme Court's factual finding, and applied a rule to the case that this Court has never announced or applied.

Duyonn Vincent was in jeopardy only once. His guilt was determined in a single trial before a single finder of fact. "A defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *United States v. Wilson*, 420 U.S. ___, 345 (footnote omitted). There is no rationale for the result reached by the Court of Appeals that is rooted in the core purpose of the Double Jeopardy Clause of the Fifth Amendment. The Michigan state court's rejection of Vincent's double jeopardy claim was neither contrary to, nor an unreasonable

application of, United States Supreme Court law. The decision of the Sixth Circuit Court of Appeals must be reversed.

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Supreme Court, U.S.
FILED
MAR 20 2003
CLERK

No. 02-524

In The
Supreme Court of the United States

JANETTE PRICE, WARDEN,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

I. Whether a state appellate court's conclusion that a trial court's words and actions did or did not amount to an acquittal for Double Jeopardy Clause purposes is a finding of fact subject to the presumption of correctness on habeas corpus review.

II. Whether the Michigan appellate courts and the lower federal courts correctly concluded that the Double Jeopardy Clause precludes a trial judge who has acquitted a defendant of a charge at the close of the prosecution's case from reinstating that same charge later in the trial.

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STATEMENT OF THE CASE

Proceedings in the State Trial Court

Respondent Duyonn Andre Vincent and two other men, Dameon Perkins and Marcus Hopkins, were tried in the Genesee County Circuit Court in Flint, Michigan, on charges of first-degree murder and using a firearm during the commission of a felony. After the prosecution's case concluded on March 31, 1992, all three defendants moved for a directed verdict on the first-degree murder charge on the ground that there was insufficient evidence of premeditation. J.A. 4-8. In response, the prosecutor argued that there was sufficient evidence of premeditation. J.A. 8-12.

If a defendant makes a motion for a directed verdict at the close of the prosecution's case, Michigan law requires the trial court to decide the motion before the defendant begins his case. See Mich. Ct. R. 6.419(A) ("The court may not reserve decision on the defendant's motion"). Therefore, after each attorney had argued, the trial judge rendered his decision:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement [sic] was

> used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

J.A. 12-13.

After the trial court issued this decision, the attorneys and the judge proceeded to discuss and resolve several other matters, including: (1) whether both juries would be present as each defendant presented his case, J.A. 13-16; (2) the order in which various defendants would present their cases and the expected length of the testimony, J.A. 16-17; (3) the procedure by which the prosecutor would formally announce to each jury that he had completed his case, J.A. 17; and (4) whether certain witnesses would be allowed in the courtroom during portions of the trial unrelated to their testimony. J.A. 17-18. After these issues were resolved, the trial judge had Respondent and the other two defendants removed from the courtroom for the day. J.A. 18.[1]

After Respondent's departure, the prosecutor told the judge that he would like to "make a brief restatement in terms of the First Degree Murder" the following morning. J.A. 18. The judge replied, "Yes, I'll be glad to hear it. Sure, I'm always glad to hear people." J.A. 18. The

[1] Petitioner's Statement of the Case replaces all of these proceedings and the removal of Respondent from the courtroom with a set of asterisk ellipses. Petitioner's Brief at 5.

prosecutor did not make a motion for reconsideration at that time, and the judge did not indicate that his earlier decision was subject to reconsideration. The court then recessed for the day.

The trial court's official docket entries for March 31, 1992, reflect the directed verdict grant, as well as several other rulings the judge made after that point:

> MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER[2] TO 2ND DEGREE MURDER. CT: II. FEL. FIREARM STAY THE SAME. MOTION BY C. ODETTE TO HAVE MARCUS HOPKINS & D. VINCENT JURY REMOVED FROM COURTROOM WHILE D. PERKINS IS ON TRIAL AND VICE VERSA. MTN GRANTED. COURT EXCUSED BOTH JURIES DEFT PERKINS JURY TO RETURN TOMORROW MORNING @ 8:30 A.M. AND DEFTS VINCENT & HOPKINGS [sic] TO RETURN TOMORROW @ 10:00.

J.A. 1.

The next day, April 1, 1992, the prosecutor argued that the judge had erred by granting the directed verdict. J.A. 21-33. Respondent's counsel immediately objected that the Double Jeopardy Clause would prohibit the judge from reversing his decision to acquit Respondent of first-degree murder. J.A. 32-33. The trial judge replied, "Counsel, you have to bear in mind, I've not informed the jury of

[2] In Michigan, a first-degree murder charge is sometimes called "open murder" because the trier of fact is free to choose between first-degree premeditated murder and the included offense of second-degree murder.

any of these things. . . . So the jury knows nothing about any of this." J.A. 33. When Respondent's counsel insisted that a reversal of the ruling would violate the Double Jeopardy Clause, the judge interjected:

> THE COURT: Do you really believe that? You think that when a decision is made that before it's recited to the parties who are directly involved in it and particularly the jury because we're asking now for the jury to not consider certain factors that might be brought to them, that a Court cannot consider what it has done? I don't know that that's right. I, I consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not, I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.
>
> MR. ODETTE (Respondent's counsel): That's . . .
>
> THE COURT: You understand what I'm saying?
>
> MR. ODETTE: I do.
>
> THE COURT: And I've not told the jury anything.

J.A. 34

Counsel for one of Respondent's codefendants then joined in the double jeopardy argument, and the judge remarked:

> THE COURT: You think double jeopardy has anything to do with this?

> MS. CUMMINGS: Yes. I believe once you've directed. A verdict –
>
> THE COURT: Why is that?
>
> MS. CUMMINGS: A verdict that that's . . .
>
> THE COURT: I haven't directed a verdict to anybody.
>
> MS. CUMMINGS: You granted our motion.
>
> THE COURT: Oh, I granted a motion but I have not directed a verdict.

J.A. 36. The trial judge then took the matter under advisement, but did not reverse his grant of directed verdict at that time. J.A. 42-43. The judge again explained that he could reconsider his decision because he had not shared his earlier ruling with the jury: "[T]here has been no harm that has come about by the Court's ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel." J.A. 42-43.

Later that day, Respondent presented his defense and testified in his own behalf. At the time Respondent testified, the judge still had not reversed the grant of directed verdict on the first-degree murder count.

It was not until the following day, April 2, 1992, two days after he "granted a motion" and one day after hearing Respondent testify and present his case, that the trial judge reversed his ruling and reinstated the first-degree murder count: "I've reconsidered the ruling that the Court earlier made and I've decided to let the jury make its own determination on the Degrees." J.A. 45-46.

The next day, April 3, 1992, Respondent was convicted of first-degree premeditated murder. He was sentenced to life imprisonment without parole.

Proceedings on Direct Appeal

On his direct appeal, the Michigan Court of Appeals unanimously reversed Respondent's first-degree murder conviction and remanded to the trial court with directions to reduce Respondent's conviction to second-degree murder and to resentence him accordingly. Pet. App. 14a-25a. The Michigan Court of Appeals explained that the trial court's decision to reverse itself and allow further factfinding on the first-degree murder count was contrary to this Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986):

> In *Smalis v. Pennsylvania*, the Supreme Court reiterated that a trial court's determination that the evidence is insufficient to convict is an acquittal under the Double Jeopardy Clause and that the Double Jeopardy Clause bars subjecting a defendant to post-acquittal fact-finding proceedings going to the guilt or innocence regarding such a charge. As explained below, we are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights.

Pet. App. 19a. The court concluded that Respondent had been acquitted:

> We reject any suggestion that the trial court did not actually direct a verdict of acquittal as to the first-degree murder charge after hearing the arguments of counsel. While the court's words "Well, my impression at this time" may be somewhat ambiguous, the court's following statement: "What we have at the very best is second-degree murder," is not ambiguous. The next morning, the judge acknowledged he had granted the motions for directed verdict. In deciding to reserve ruling, the court referred to the "ruling" it had made earlier, and in submitting the first-degree murder charge to the jury, the court said it had reconsidered the "ruling" it had previously made.

Pet. App. 22a-23a. The Michigan Court of Appeals therefore concluded, relying on *Smalis*, that the trial judge had violated Respondent's Double Jeopardy Clause rights by submitting the first-degree murder charge to the jury:

> The court made a ruling that it later reconsidered. However, once the court rendered its ruling on the record directing a verdict of acquittal on the first-degree murder charge, double jeopardy principles forbade it from changing its mind and allowing the jury to consider a first-degree murder charge. The court's reversal of its directed verdict resulted in further proceedings where the jury resolved factual issues going to the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge. *Smalis, supra*.

Pet. App. 23a.

The Michigan Supreme Court reversed and reinstated Respondent's first-degree murder conviction by a vote of four to three. Pet. App. 26a-51a. The Michigan Supreme

Court began its analysis by recognizing that the trial judge's characterization of his own ruling was not controlling and that, therefore, an appellate court must determine "whether the ruling in [defendant's] favor was actually an 'acquittal' even though the District Court characterized it otherwise." Pet. App. 34a (quoting *United States v. Wilson*, 420 U.S. 332, 336 (1975)).

The Michigan Supreme Court majority summarized its decision:

> We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

Pet. App. 42a. In a footnote, the majority explained that "[f]actors that might be considered in evaluating finality, in addition to a clear statement in the record or a signed order, might also include an instruction to the jury that a charge or element of the charge has been dismissed by the

judge or that a docket entry has been made reflecting the trial court's action." Pet. App. 41a-42a, n. 9. The majority did not acknowledge that a docket entry reflecting the trial judge's action had been made in this case.[3]

Since the majority concluded that the trial judge had never granted a directed verdict, it did not squarely reach the Michigan Court of Appeals' holding that a trial judge cannot reverse a grant of directed verdict later in the trial. The majority agreed, however, after a discussion of *Smalis*, that "characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions." Pet. App. 35a.

The three dissenting justices concluded that the trial judge had actually terminated Respondent's jeopardy on the first-degree murder charge. Pet. App. 45a-50a. Agreeing with the majority that *Smalis* precludes a trial judge from reversing a directed verdict grant later in the trial, the dissent therefore concluded that the trial judge violated the Double Jeopardy Clause by reinstating the first-degree murder count after Respondent testified. Pet. App. 50a-51a.

Respondent moved for reconsideration in the Michigan Supreme Court, pointing out that a docket entry had been made reflecting the trial judge's decision to grant a directed verdict on the first-degree murder count, but the

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[3] The Michigan Supreme Court apparently was unaware of the docket entry because the State, the appellant in that court, failed to include the trial court's docket entries in its appendix. See Mich. Ct. R. 7.307(A)(2) (appellant's appendix in Michigan Supreme Court "must contain . . . the relevant docket entries both in the lower court and in the Court of Appeals").

court denied reconsideration. *People v. Vincent*, 456 Mich. 1201 (1997). This Court subsequently denied Respondent's petition for a writ of certiorari. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Proceedings On Habeas Corpus

Respondent filed a petition for writ of habeas corpus in the district court in 1998. The magistrate issued a report and recommendation that the writ should be granted and that Respondent's conviction should be reduced to second-degree murder. Pet. App. 52a-77a. The district court overruled Petitioner's objections to the report, adopted the report as the court's own opinion, and granted the writ on November 3, 2000. Pet. App. 78a-83a.

The district court held that since the trial judge's words and actions were uncontested, the question of whether those words and actions amounted to an acquittal was a legal question not subject to the presumption of correctness. Pet. App. 71a, 79a. The district court concluded that the trial judge's decision on the motion for directed verdict "was clearly a determinative ruling on the sufficiency of the evidence of premeditation and deliberation and constituted a verdict of acquittal on the first-degree murder charge for double jeopardy purposes." Pet. App. 72a (citing *United States v. Ball*, 163 U.S. 662, 671 (1896)). The court observed that, "[i]ndeed, that decision was formalized by the docket entry of March 31, 1992, indicating that the charge of open murder was amended to second-degree murder." Pet. App. 72a (footnote omitted). Finally, the district court held, relying on *Smalis*, that the trial judge's reversal later in the trial subjected

Respondent to further factfinding proceedings in violation of the Double Jeopardy Clause. Pet. App. 75a, 80a-81a.

The United States Court of Appeals for the Sixth Circuit affirmed. Pet. App. 1a-12a. The Sixth Circuit agreed with the district court that the question of whether the trial judge had acquitted Respondent was a question of law not subject to the presumption of correctness. Pet. App. 9a-10a. After examining the trial judge's statements and the docket entry, the Sixth Circuit concluded that "when the trial judge granted the motion for directed verdict on March 31, 1992, his actions constituted a grant of an acquittal on the first-degree murder charge such that jeopardy attached." Pet. App. 12a. Finally, the Sixth Circuit agreed with the Michigan Court of Appeals, the Michigan Supreme Court, and the district court that the Double Jeopardy Clause bars a trial judge who has acquitted a defendant of a charge from reinstating that charge later in the trial. Pet. App. 12a.

On January 10, 2003, this Court granted the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Michigan Supreme Court's conclusion that the trial judge never granted an acquittal on the first-degree murder count was not a finding of fact, and the district court and the Sixth Circuit therefore correctly refused to apply the presumption of correctness to that conclusion. This Court has specifically held that an appellate court's characterization of a trial judge's words and actions for purposes of the Double Jeopardy Clause, like the trial

judge's own characterization of those words and actions, is a legal conclusion.

The question of whether the district court properly applied the standard of review from the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to the Michigan Supreme Court's legal conclusion is not before this Court because Petitioner did not raise this issue either in this Court or in the Sixth Circuit. It is clear, however, that the district court did properly apply the AEDPA standard of review to the Michigan Supreme Court's decision. The district court correctly found that the Michigan Supreme Court's holding that a directed verdict of acquittal must be reduced to writing or otherwise formalized is contrary to, or an unreasonable application of, many of this Court's precedents. The Michigan Supreme Court's conclusion that Respondent was not acquitted of first-degree murder is patently unreasonable given the trial judge's clear decision granting the motion for directed verdict, his repeated statements in which he later acknowledged that he had granted the motion, and the trial court's docket entry reflecting the grant. Since the Michigan Supreme Court announced that a docket entry could satisfy its new test but ignored the docket entry in this case, that court's decision is so patently erroneous that Respondent would prevail even if the presumption of correctness applied.

The Michigan appellate courts and the lower federal courts correctly held that this Court's precedents bar a trial judge from reversing a directed verdict grant later in the trial. Since the Michigan appellate courts held in favor of Respondent on this issue, Respondent does not have the burden of showing that a contrary decision would have satisfied the AEDPA standard of review, but this Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986),

demonstrates that Respondent would be able to satisfy that burden.

Smalis establishes that a midtrial acquittal on some counts cannot be reversed even in the context of a continuing trial because it would subject the defendant to further factfinding proceedings on the acquitted counts. Courts that have applied *Smalis* to similar situations have uniformly held that the Double Jeopardy Clause bars a trial judge from reversing a directed verdict later in the trial. This bright line rule is equivalent to the rule that a jury acquittal is final when the jury is discharged immediately after delivering the verdict. While some courts have held that an immediate motion for reconsideration may be considered, once the parties and the judge move on to other matters or take a recess, the defendant must be able to rely on the acquittal as he plans his defense and makes critical decisions as to the remaining charges. A rule that a judge could reverse a directed verdict later in the trial would be inconsistent with *Smalis* itself and would subject a defendant to continuing anxiety over the possibility that his acquittal might be reversed after he has made crucial decisions in reliance on the acquittal.

Respondent was subjected to postacquittal factfinding in violation of the Double Jeopardy Clause. After the trial judge announced his decision, the parties moved on to other matters and then took an overnight recess, during which Respondent had to decide how to defend against the remaining charges the following day. The trial judge then announced that he would reconsider his decision, but did not reverse the acquittal until the day after Respondent had testified and presented his entire defense case. Since Respondent was twice placed in jeopardy on the

first-degree murder charge, the federal courts correctly granted the writ of habeas corpus.

ARGUMENT

I. The Michigan Supreme Court's conclusion that the trial judge never acquitted Respondent of first-degree murder is a legal conclusion not subject to the presumption of correctness, and the federal courts correctly found that conclusion to be unreasonable.

A. An appellate court's conclusion that a trial judge has or has not acquitted a criminal defendant for Double Jeopardy Clause purposes is not a finding of fact subject to the presumption of correctness on habeas corpus review.

Petitioner first argues that the Sixth Circuit erred in refusing to afford the presumption of correctness to the Michigan Supreme Court's conclusion that the trial court had not acquitted Respondent of the first-degree murder charge. Petitioner's Brief at 14-24. See 28 U.S.C. § 2254(e)(1) (in habeas corpus proceeding, "a determination of a factual issue made by a State court shall be presumed to be correct"). According to Petitioner, "the Michigan Supreme Court decided Vincent's claim on a purely factual basis, finding as a matter of fact that the trial court did not grant the motion for directed verdict[.]" Petitioner's Brief at 16.

This Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), forecloses Petitioner's argument. In *Smalis*, this Court unanimously held that it was not

bound by the Pennsylvania Supreme Court's characterization of the trial judge's ruling in that case: "[J]ust as 'the trial judge's characterization of his own action cannot control the classification of the action under the Double Jeopardy Clause,' *so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.*" *Id.*, 476 U.S. at 144 n. 5 (emphasis added; internal brackets deleted; quoting *United States v. Scott*, 437 U.S. 82, 96 (1978)).

If this Court had regarded the Pennsylvania Supreme Court's characterization of the trial court's action in *Smalis* as a factual matter, this Court would have deferred to that characterization, even on direct review. See, *e.g.*, *Hernandez v. New York*, 500 U.S. 352, 364-366 (1991) (plurality opinion) (applying "deferential standard of review" to state court factual finding that prosecutor did not intentionally discriminate against Latino jurors). This Court afforded no such deference in *Smalis* because the characterization of a trial judge's words and actions "as a matter of double jeopardy law" is, by definition, a legal matter. *Smalis*, 476 U.S. at 144 n. 5.

The Michigan Supreme Court itself understood that its task was not to find facts but to characterize the trial judge's words and actions as a matter of double jeopardy law:

> We recognize that a judge's characterization of a ruling and the form of the ruling may not be controlling. The Court must inquire whether the ruling in [defendant's] favor was actually an "acquittal" even though the District Court characterized it otherwise. Ultimately what we must determine is whether the ruling of the judge,

> whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

Pet. App. 34a (internal citations and quotation marks omitted) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 & n. 9 (1977)). The Michigan Supreme Court thus correctly recognized that it was not bound by the trial judge's own conclusion that he had not granted a directed verdict because that conclusion is not a finding of fact.

The trial judge's characterization of his own actions perfectly illustrates why such a characterization is not a finding of fact. There was no dispute as to what the trial judge said and did in response to Respondent's motion for directed verdict. Indeed, the trial judge himself stated that he made a "decision," "granted a motion," made a "ruling," and came to a "conclusion." J.A. 34, 36, 42, 45-46. The only question was what those words and actions meant *as a matter of double jeopardy law*. The trial judge took the position, *as a matter of double jeopardy law*, that although he had made a ruling and granted a motion for directed verdict, such a ruling does not ripen into an acquittal until the judge informs the jury. J.A. 33, 34, 36, 42-43. The trial judge's position was wrong, *as a matter of double jeopardy law*, because it is directly contrary to *Sanabria v. United States*, 437 U.S. 54, 64 n. 18 (1978), where this Court held that, "[i]t is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal."

The Michigan Supreme Court's conclusion was similarly based on legal principles. The Michigan Supreme Court held, *as a matter of double jeopardy law*, that a trial

judge's oral statement granting a directed verdict motion is not sufficient to terminate jeopardy unless accompanied by certain formal trappings: "A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. . . . None of the indicia of formality associated with final judgments are [sic] present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all." Pet. App. 40a. The Michigan Supreme Court then went on to explain that its newly minted formal trappings requirement could be satisfied by, among other things, "a docket entry . . . reflecting the trial court's action." Pet. App. 42a n. 9.[4]

Petitioner cites no precedent treating as a finding of fact an appellate court's conclusion, for double jeopardy purposes, that a trial judge has or has not granted an acquittal, and Respondent is not aware of any such precedent. The reason such precedent apparently does not exist is that it would be squarely contrary to *Smalis*.

Petitioner does cite *Parker v. Dugger*, 498 U.S. 308 (1991), for the unremarkable proposition that an appellate court's characterization of an ambiguous transcript can amount to a finding of fact. Petitioner's Brief at 21-22. The issue in *Parker*, however, was the purely factual question

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[4] As discussed in part B of this argument, *infra*, the Michigan Supreme Court's holding that an acquittal must be accompanied by certain formalities in order to count for double jeopardy purposes is just as contrary to this Court's precedents as the trial judge's conclusion that a directed verdict would not become final until he informed the jury.

of whether the trial judge had or had not considered a mitigating circumstance during a capital sentencing. *Id.* 498 U.S. at 320. Indeed, in the sentence immediately following the end of the block quote reproduced on pages 21-22 of Petitioner's Brief, this Court observed, "This is not a legal issue; no determination of the legality of Parker's sentence under Florida law necessarily follows from a resolution of the question of what the trial judge found." *Parker*, 498 U.S. at 320. The exact opposite is true here; the issue in this case is a legal issue, and the legality of Respondent's conviction does necessarily follow from a resolution of the question of whether the trial court granted a directed verdict.

In sum, the Michigan Supreme Court's conclusion that Respondent was never acquitted of first-degree murder for purposes of double jeopardy is not a finding of fact. Therefore, the Sixth Circuit correctly refused to afford the presumption of correctness to that holding. However, even if the presumption of correctness had applied, the Michigan Supreme Court's failure to consider the dispositive docket entry and its conclusion that the judge never actually ruled on the directed verdict motion would have been more than enough to overcome that presumption.

B. Since Petitioner never challenged in either the Sixth Circuit or this Court the district court's application of the AEDPA standard of review to the Michigan Supreme Court's legal conclusions, that question is not properly before this Court, but the district court properly applied those standards to grant the writ.

Petitioner's entire first argument is devoted to the proposition that the Michigan Supreme Court's ruling is a pure finding of fact. Therefore, Petitioner does not argue that the district court or the Sixth Circuit improperly applied the standard of review from 28 U.S.C. § 2254(d)(1), that is, whether the Michigan Supreme Court's decision that Respondent was never acquitted was contrary to, or an unreasonable application of, this Court's precedents. See *Williams v. Taylor*, 529 U.S. 362 (2000). Since Petitioner also did not raise this argument in the Petition for Writ of Certiorari, this question is not properly before the Court.

Petitioner could not have raised that issue in this Court because she never raised it below. Petitioner, the appellant in the Sixth Circuit, never argued in that court that the district court had misapplied § 2254(d)(1), instead choosing to argue only, as she does now, that the Michigan Supreme Court's decision was a pure finding of fact subject to the presumption of correctness. Appellant's Sixth Circuit Brief at 12-20.[5]

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[5] Amici curiae Texas, et al., and the Criminal Justice Legal Foundation (CJLF), however, both devote their briefs to an issue not before this Court, namely, whether the Sixth Circuit correctly applied

(Continued on following page)

That the district court properly applied the *Williams* standard is clear from the record. In an opinion adopted by the district court, the magistrate judge discussed the *Williams* standard of review at length, meticulously examined the record and this Court's relevant precedents, and concluded that the Michigan Supreme Court's decision amounted to an unreasonable application of this Court's precedents. Pet. App. 62a-76a. Even though Petitioner does not contend otherwise, Respondent shall briefly demonstrate that the district court correctly applied the *Williams* standard to this case.

On March 31, 1992, at the conclusion of the prosecution's case and after argument of counsel, the trial judge specifically found that the prosecution had failed to prove premeditation, an essential element of first-degree premeditated murder, and that the appropriate charge was therefore second-degree murder. J.A. 12-13. After the trial judge announced this ruling, none of the parties sought any clarification or reconsideration. Instead, in a clear indication that all concerned understood that the judge had made his decision, the judge and the attorneys simply

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the *Williams* standard of review to the Michigan Supreme Court's conclusion that Respondent was never acquitted. Texas and CJLF overlook the fact that the district court plainly and correctly applied the *Williams* standard to the Michigan Supreme Court's holding, and that the Sixth Circuit did not discuss this point in detail *because Petitioner never challenged the district court's application of the Williams standard* during her appeal to the Sixth Circuit. In other words, amici chastise the Sixth Circuit for not explicitly discussing an issue the appellant never raised in that court. Both amici further weaken their arguments that the Michigan Supreme Court's conclusion was reasonable by failing to even mention the existence of the docket entry reflecting the trial judge's grant of the directed verdict.

moved on to other matters and proceeded to resolve several issues as to how the remainder of the trial would be conducted. JA. 13-18.

The trial judge's action was then recorded, in unambiguous language, in the court's official docket entries. J.A. 1. The trial judge himself later referred to the "ruling that the Court earlier made," J.A. 45, and observed at various times that he had made a "decision," J.A. 34, "granted a motion" for a directed verdict, J.A. 36, made a "ruling," J.A. 42, and reached a "conclusion." J.A. 42. The judge consistently took the legally incorrect position that he could revisit his ruling later in the trial simply because he had not told the jury about it. Cf. *Sanabria*, 437 U.S. at 64 n. 18 (holding that it is "without constitutional significance" that judge granted acquittal himself without involving jury).

The Michigan Supreme Court's conclusion that none of this amounted to an acquittal was predicated on two premises. First, the Michigan Supreme Court reasoned that an oral acquittal not accompanied by a written judgment or some other formal trappings was insufficient to terminate jeopardy. Pet. App. 38a-42a. This conclusion is, however, directly contrary to, among other precedents of this Court, *United States v. Ball*, 163 U.S. 662 (1896), which held an acquittal was final despite the entry of a defective judgment because "a verdict of acquittal, *although not followed by any judgment*, is a bar to a subsequent prosecution for the same offense." *Id.* at 671 (emphasis added).

The Michigan Supreme Court's emphasis on the form of the acquittal instead of its substance is contrary to, or at least an unreasonable application of, several of this

Court's precedents in addition to *Ball*. In *Martin Linen*, this Court explained, "we have emphasized that what constitutes 'an acquittal' is not to be controlled by the *form* of the judge's action. Rather, we must determine whether *the ruling* of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571 (emphasis added) (citations omitted). See also *Kepner v. United States*, 195 U.S. 100, 133 (1904) ("to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment"); *Green v. United States*, 355 U.S. 184, 187, 190-191 (1957) (holding that guilty verdict on lesser offense amounts to acquittal on greater offense, even though resulting judgment does not reflect "express verdict" of acquittal on greater offense); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984) ("Acquittals, unlike convictions, terminate the initial jeopardy. This is so whether they are 'express or implied by a conviction on a lesser offense.'") (quoting *Price v. Georgia*, 398 U.S. 323, 329 (1970)).

The trial judge here, by his own admission, made a "ruling" that the prosecution had failed to prove premeditation, one of the factual elements of the charged offense of first-degree murder. The Michigan Supreme Court's holding that this ruling was inadequate because it was not accompanied by certain formalities is thus contrary to, or at the very least an unreasonable application of, this Court's precedents that teach that it is the substance, not the form, of an acquittal that matters for double jeopardy

purposes and that such an acquittal is final even if it is never formalized.[6]

Second, the Michigan Supreme Court expressly acknowledged that the formal trappings requirement it had just created could be satisfied if "a docket entry has been made reflecting the trial court's action." Pet. App. 42a n. 9. However, the Michigan Supreme Court failed to acknowledge that precisely such a docket entry had been made in this case on March 31, 1992: "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER." J.A. 1. Thus, even under the criteria set forth by the Michigan Supreme Court, Respondent's jeopardy on the first-degree murder count terminated on March 31, 1992.[7]

Petitioner cites *People v. Kelley*, 449 N.W.2d 109 (Mich. Ct. App. 1989), for the proposition that a Michigan docket entry is not equivalent to a written order for

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[6] In addition, the Michigan Supreme Court's emphasis on the absence of a written order is particularly unreasonable when, as here, the trial court is required to make a ruling in the middle of a continuing jury trial. It would often be impractical to require a judge to suspend a jury trial so that he or she may draft and formally issue a written order in order to satisfy an appellate court. The important point, of course, is that not only would such a requirement be impractical but it would also be contrary to this Court's precedents discussed above.

[7] As discussed in footnote 3, *supra*, the Michigan Supreme Court was apparently unaware of the docket entry because the State, the appellant in the Michigan Supreme Court, failed to include it in its appendix, in violation of Mich. Ct. R. 7.307(A)(2). However, the docket entry was already part of the record in the Michigan Supreme Court, see Mich. Ct. R. 7.311(A) (an appeal in the Michigan Supreme Court "is heard on the original papers, which constitute the record on appeal"), so that court should have been aware of the docket entry despite the State's error.

purposes of computing the time to appeal and also points out that it is not clear whether the trial judge made the docket entry himself. Petitioner's Brief at 27 & n. 3. Petitioner misses the point that the Michigan Supreme Court announced in this very case that a docket entry, whether made by the judge or a clerk, is precisely the sort of formality that it would find sufficient to finalize a directed verdict

As the district court observed, the docket entry the Michigan Supreme Court ignored also demonstrates that its conclusion is an unreasonable application of this Court's precedents. Pet. App. 72a, 75a. The docket entry confirms that the trial court itself understood that the judge had made a dispositive ruling on March 31, 1992, just as the trial judge's later statements, in which he explained he made a "ruling" and "granted a motion," confirm that same understanding. J.A. 36, 42, 45.

In short, the Michigan Supreme Court issued a decision that was contrary to, or an unreasonable application of, this Court's binding precedents. Despite this Court's decisions requiring an appellate court to review a trial court's words and actions in a non-formalistic manner to determine whether a defendant has been acquitted, the Michigan Supreme Court placed primary emphasis on the absence of formal trappings, and then compounded its error by failing to realize that the trial court's actions had actually met the formal criteria it had just created. Therefore, the district court correctly granted the writ of habeas corpus and the Sixth Circuit correctly affirmed that decision after rejecting each of the arguments Petitioner actually made in that court.

II. The Michigan appellate courts and the lower federal courts correctly held that the Double Jeopardy Clause barred the trial judge from reversing his grant of acquittal on the first-degree murder charge later in the trial and subjecting Respondent to postacquittal fact-finding proceedings.

A. Respondent has no burden to show that a state court decision *in his favor* is contrary to, or an unreasonable application of, this Court's precedents.

Petitioner argues that a trial judge may reverse his own grant of an acquittal later in the same trial, at least before further proceedings occur. As a preliminary matter, however, Petitioner also argues that she must prevail even if her argument is wrong because, according to Petitioner, this Court's precedents fail to clearly establish that a trial judge may not reverse his decision to grant an acquittal later in the trial. Petitioner's Brief at 28-38. Therefore, Petitioner argues, a state court decision holding that a trial judge may reverse his grant of an acquittal later in the trial would not be contrary to, or an unreasonable application of, this Court's precedents as required for habeas corpus relief under 28 U.S.C. § 2254(d)(1). See *Williams*, 529 U.S. at 412.

There are two fundamental problems with Petitioner's preliminary argument. First, as Respondent shall demonstrate in parts B and C of this argument, *infra*, this Court's precedents, particularly *Smalis*, do clearly establish that a trial judge's grant of a midtrial motion for acquittal on some counts terminates jeopardy and bars all further factfinding proceedings on those counts.

Second, Petitioner's argument ignores the point that the Michigan appellate courts held in favor of *Respondent* on this issue. In other words, Petitioner would have this Court "defer" to a state court "decision" that the Michigan courts affirmatively rejected. The Michigan Court of Appeals held, relying on *Smalis*, that the trial judge could not reverse his grant of directed verdict later in the trial without subjecting Respondent to postacquittal factfinding proceedings in violation of the Double Jeopardy Clause. Pet. App. 19a. On the State's appeal to the Michigan Supreme Court, that court agreed, again relying on *Smalis*, that a trial judge may not reverse a grant of directed verdict later in the trial and that, therefore, "characterizing the [trial] court's comments as a directed verdict would compel us to overturn [Respondent's] convictions." Pet. App. 34a-35a.

It is therefore Petitioner, not Respondent, who believes that the Michigan courts incorrectly applied this Court's precedents on the question of whether a trial judge may reverse a grant of directed verdict later in the trial. It is not Respondent's burden to show that the state appellate courts issued a decision contrary to, or an unreasonable application of, this Court's precedents on the second issue before this Court when Respondent maintains that the state appellate courts decided that issue correctly.

A habeas corpus petitioner must, of course, demonstrate that the state court "decision" under challenge is contrary to, or an unreasonable application of, this Court's precedents. *Williams*, 529 U.S. at 412. Accordingly, Respondent challenged in his habeas corpus petition the Michigan Supreme Court's decision that the trial judge never granted a directed verdict, and the district court held that this decision is contrary to, or an unreasonable

application of, this Court's precedents. See Argument I(B), *supra*. Respondent did not have to further prove to the district court that the Michigan appellate courts made unreasonable decisions on issues where Respondent believes they pronounced the law correctly. To put it simply, AEDPA requires federal courts to give the benefit of the doubt to objectively reasonable state court decisions, see *Woodford v. Visciotti*, 537 U.S. ___, 123 S.Ct. 357, 360 (2002), but AEDPA certainly does not require federal courts to give any such deference to prosecutorial arguments that the state courts themselves affirmatively rejected.

That said, Respondent shall now show in the remainder of this argument that even if the Michigan appellate courts *had* held that a trial judge is free to reverse his own grant of a directed verdict later in the trial, that decision would have been contrary to, or an unreasonable application of, this Court's precedents, especially *Smalis*.

B. This Court's precedents establish that a directed verdict of acquittal terminates jeopardy on the acquitted charge and precludes any further factfinding proceedings, even if a second trial is not required.

In an unbroken line of cases stretching back more than a century, this Court has recognized that the Double Jeopardy Clause accords absolute finality to an acquittal, even an acquittal unaccompanied by any formal judgment, if reversal of that acquittal would require any further factfinding proceedings going to the defendant's guilt or innocence. "Perhaps the most fundamental rule of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise,

without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen*, 430 U.S. at 571 (quoting *Ball*, 163 U.S. at 671); see also *Green*, 355 U.S. at 188 ("it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'") (quoting *Ball* at 671). As one leading double jeopardy scholar explained, "[A]n acquittal always bars further proceedings. This is the only absolute rule of traditional double jeopardy analysis, and the Supreme Court has clung tenaciously to it through a series of cases that invited exceptions." George C. Thomas, III, *An Elegant Theory of Double Jeopardy*, 1988 U.Ill. L. Rev. 827, 852 (1988).

"[A] trial court's finding of insufficient evidence also is the equivalent of an acquittal[.]" *Richardson v. United States*, 468 U.S. 317, 325 n. 5 (1984) (citing *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n. 5 (1981)). Even when the trial judge in a jury trial acquits a defendant on an "egregiously erroneous foundation[,]" that acquittal is as final as a jury acquittal. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). See also *Martin Linen*, 430 U.S. at 573 (recognizing that *Fong Foo* established trial judge's directed verdict grant as "binding authority for purposes of double jeopardy"); *Sanabria*, 437 U.S. at 64, 69 (holding trial judge's midtrial acquittal on one count, "however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error"); cf. *United States v. Scott*, 437 U.S. 82 (1978) (holding that Double Jeopardy Clause does not bar reversal of trial court's midtrial dismissal on grounds unrelated to guilt or innocence); *United States v. Wilson*, 420 U.S. 332 (1975) (holding that Double Jeopardy Clause does not bar reversal of trial judge's decision to acquit defendant after jury convicted him since reversal would not require further factfinding proceedings).

In *Smalis*, this Court unanimously held that after a trial judge grants a directed verdict during a trial, the Double Jeopardy Clause bars not only a new trial on the acquitted counts but also a continuation of the same trial on those counts. As the Michigan Court of Appeals and the Michigan Supreme Court each recognized, *Smalis* is indistinguishable from Respondent's case in all relevant respects, and the legal principles enunciated in *Smalis* therefore preclude a trial judge from reversing a grant of directed verdict later in the trial.

The defendants in *Smalis*, like Respondent, were tried on multiple charges. At the conclusion of the prosecution's case, the trial judge ruled that the evidence was legally insufficient to support a guilty verdict on three of the charges and that the trial would therefore continue only on the remaining four charges. *Commonwealth v. Smalis*, 480 A.2d 1046, 1048 & n. 1 (Pa. Super. Ct. 1984). The prosecution took an immediate appeal from this decision and a second appeal from the trial judge's subsequent ruling reaffirming his first decision, and the trial judge stayed completion of the trial pending the appeals. *Id.* at 1048 & nn. 1-2. The Pennsylvania Superior Court held that the Double Jeopardy Clause barred the appeals because a reversal of the trial judge's decision would require further proceedings devoted to the resolution of factual issues. *Id.* at 1052.

After the Pennsylvania Supreme Court reinstated the prosecution's appeals, *Commonwealth v. Zoller*, 490 A.2d

394 (Pa. 1985), this Court granted certiorari and unanimously reversed. This Court first held that the trial judge's ruling amounted to an acquittal for Double Jeopardy Clause purposes, 476 U.S. 140, 144 & n. 5, and then rejected the Commonwealth's argument that a reversal of that acquittal would not violate the Double Jeopardy Clause:

> The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U.S. at 308. Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. *Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984).
>
> When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a post-acquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Martin Linen*, 430 U.S. at 570 (1977).

Smalis, 476 U.S. at 145-146 (footnotes and internal citation omitted). The Court concluded, "We hold, therefore, that the trial judge's granting of petitioners' demurrer was an acquittal under the Double Jeopardy Clause, and that the Commonwealth's appeal was barred because reversal would have led to further trial proceedings." *Id.* at 146.

C. *Smalis* establishes that a trial judge who reverses his or her directed verdict grant later in the trial subjects the defendant to postacquittal factfinding proceedings in violation of the Double Jeopardy Clause.

It follows immediately from *Smalis* that a grant of a directed verdict cannot be reversed later in the trial because that "reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Id.* It is therefore not surprising that the appellate courts that have applied *Smalis* to a trial judge's reversal of a directed verdict, including the Michigan Court of Appeals and the Michigan Supreme Court in this case, have concluded that the Double Jeopardy Clause forbids such a reversal. See, e.g., *State v. Millanes*, 885 P.2d 106, 109-111 (Ariz. Ct. App. 1994) (judge could not reverse directed verdict grant on motion for reconsideration); *Brooks v. State*, 827 S.W.2d 119, 121-123 (Ark. 1992) (judge's oral grant of directed verdict terminated jeopardy and precluded later reconsideration); *Lowe v. State*, 744 P.2d 856, 856-858 (Kan. 1987) (jeopardy terminated with oral grant of directed verdict so as to preclude reversal next day). Other courts have reached the same conclusion from this Court's earlier precedents even without relying on *Smalis*. See, e.g.,

United States v. Blount, 34 F.3d 865, 868-869 (9th Cir. 1994) (judge's oral grant of directed verdict terminated jeopardy so as to preclude court's reconsideration the following day); *Caldwell v. State*, 803 So.2d 839, 841 (Fla. Dist. Ct. App. 2001) (judge could not reverse directed verdict granted at close of prosecution's case after hearing defendant's case); *People v. Henry*, 769 N.E.2d 34, 41-44 (Ill. App. Ct. 2001) (judge could not reverse oral directed verdict grant after recess and further argument); *Barnes v. State*, 9 S.W.3d 646, 647-651 (Mo. Ct. App. 1999) (judge could not reverse directed verdict granted at close of prosecution's case after defendant presented evidence); *State v. Blacknall*, 672 A.2d 1170, 1173-1176 (N.J. Super. Ct. 1995) (same), *aff'd*, 672 A.2d 1132 (N.J. 1996).

By contrast, those lower courts that have held that a judge may reverse his or her directed verdict grant later in the trial have almost uniformly failed to even cite *Smalis* and have held, directly contrary to *Smalis*, that this procedure does not violate double jeopardy simply because it does not require a second trial. Most of the courts espousing that view have relied on the Second Circuit's pre-*Smalis* decision in *United States v. LoRusso*, 695 F.2d 45, 50 (2d Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983). In *LoRusso*, the Second Circuit relied on the argument, subsequently rejected in *Smalis*, that a directed verdict may be reversed so long as a second trial is not required:

> [W]e see no reason why the trial court in the present case was not free before the entry of judgment to amend its own ruling *since it did so without subjecting the defendants to a second trial*. . . . In the circumstances of this case, where the court's oral decision was followed promptly by the modification providing for the reduction instead of the elimination of count 2, and where the reduced count could be, and was, submitted in the normal course of the trial *to the original jury*, we conclude that the action of the trial court did not violate principles of double jeopardy.

LoRusso, 695 F.2d at 54 (emphasis added; footnote omitted). The Second Circuit continues to follow *LoRusso*, apparently unaware that *Smalis* rejected the reasoning underlying that decision. See *United States v. Washington*, 48 F.3d 73, 79 (2d Cir.) (relying on *LoRusso* to conclude that trial judge could reverse grant of acquittal later in trial because reversal did not result in "second trial" or "successive prosecution"), *cert. denied*, 515 U.S. 1151 (1995); see also *United States v. Rahman*, 189 F.3d 88, 132 (2d Cir. 1999) (relying on *LoRusso* to conclude judge could reverse grant of acquittal after weekend recess, particularly since jury was not informed), *cert. denied*, 528 U.S. 1094 (2000). A few other lower courts have approvingly cited *LoRusso* in dicta while failing to cite *Smalis*. See *United States v. Byrne*, 203 F.3d 671, 673-675 (9th Cir. 2000) (approvingly citing *LoRusso* but holding that trial judge never granted directed verdict because she announced "in the same colloquy" that her decision was not final), *cert. denied*, 531 U.S. 1114 (2001); *United States v. Baggett*, 251 F.3d 1087, 1092-1097 (6th Cir. 2001) (approvingly citing *LoRusso* but holding that trial judge never granted directed verdict motion until after jury's verdict), *cert. denied*, 534 U.S. 1167 (2002); see also *State v. Iovino*, 524 A.2d 556, 557-560 (R.I. 1987) (holding, without citation to *Smalis* or *LoRusso*, that trial judge could reverse grant of directed verdict since "defendant was not faced with any threat of reprosecution beyond the jury already impaneled to hear his case"); *Campbell v. Schroering*, 763 S.W.2d 145, 147 (Ky. Ct. App. 1988) (holding, without

citation to any authority, that judge could reverse directed verdict before jury discharged); *State v. Sperry*, 945 P.2d 546 (Or. Ct. App. 1997) (holding, without citation to *Smalis* or *LoRusso*, that trial judge could reverse directed verdict grant following day).[8]

In short, there is a post-*Smalis* split of lower court authority on the question of whether the Double Jeopardy Clause forbids a trial judge from reversing a directed verdict grant later in the trial. However, the lower courts that have held that a trial judge may do so have almost uniformly reached that conclusion by overlooking this Court's unanimous decision in *Smalis* and relying instead on reasoning that this Court firmly rejected in *Smalis*. The lower courts that have actually considered and applied *Smalis* to this situation have ruled that a trial judge may not reverse a directed verdict grant later in the trial because doing so subjects the defendant to postacquittal factfinding proceedings.

The United States argues, however, that *Smalis* is distinguishable from this case because *Smalis* involved an appeal, as opposed to the trial judge's reconsideration of

[8] *In the Matter of Lionel F.*, 558 N.E.2d 30 (N.Y.), *cert. denied*, 498 U.S. 923 (1990), appears to be the only decision to cite *Smalis* and still hold, relying on *LoRusso*, that a judge may reverse a directed verdict later in the trial. The majority in *Lionel F.* distinguished *Smalis* on the ground that *Smalis* "involved a prosecutor's appeal from an order of dismissal in a trial long since concluded. The order had been entered and was clearly final." *Id.* at 31. Thus, the *Lionel F.* majority simply misread *Smalis*: the trial in *Smalis* had not "long since concluded" but was to continue on the remaining counts, and the Pennsylvania Superior Court expressly declined to decide whether the trial court's decision was final for appellate purposes. 480 A.2d at 1048 & nn. 1-2.

his or her own decision. Brief of United States at 13-17. According to the United States, a trial judge's grant of a directed verdict during a continuing trial is *never* final for Double Jeopardy Clause purposes so long as the judge enjoys inherent authority to revisit his or her own rulings any time before final judgment. *Id.* at 14-16. To explain the result in *Smalis* itself, the United States contends that since the prosecution was able to take an interlocutory appeal, the midtrial acquittal there must have been sufficiently final to preclude reconsideration. *Id.* at 16-17.

The United States' attempt to distinguish *Smalis* fails for at least four reasons. First, nothing in this Court's decision in *Smalis* hinged on the fact that an appeal had been taken. The Double Jeopardy Clause violation this Court condemned was not the appeal but "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence," however that might occur. *Smalis*, 476 U.S. at 145. The appeal in *Smalis* was relevant only because a "successful postacquittal appeal by the prosecution *would lead to proceedings that violate the Double Jeopardy Clause*" and therefore "the appeal itself has no proper purpose." *Id.* (emphasis added). *Smalis* flatly holds that postacquittal factfinding is always unconstitutional, and nothing in *Smalis* remotely suggests that postacquittal factfinding would somehow become constitutional if no appeal was involved.

Second, the procedural posture of *Smalis* itself directly contradicts the United States' argument. This Court's opinion certainly never suggested that the appeal proved that the trial judge's acquittal was somehow more final than other midtrial acquittals. In fact, the Pennsylvania Superior Court had explicitly refused to decide whether it was a final order at all. 480 A.2d at 1048 n. 1

("we do not decide whether the court's order in this case was interlocutory or sufficiently final to permit appeal"). The line the United States attempts to draw between a midtrial acquittal sufficiently final to allow an interlocutory appeal and a midtrial acquittal still subject to later reconsideration cannot even explain *Smalis* itself because the trial judge there agreed to reconsider his decision *after* the prosecution had already appealed it. *Id.* at 1048 & n. 2 (noting that trial judge reconsidered and reaffirmed acquittal after prosecution appealed). Therefore, this Court could not possibly have concluded that the appeal in *Smalis* made that acquittal more final for Double Jeopardy Clause purposes than all other midtrial acquittals.

Third, the United States' argument would nullify *Smalis* in any case, such as *Smalis* itself, where the defendant still faces further trial on remaining counts. Since the trial judge in *Smalis* did not grant a demurrer on all counts, the defendants faced further trial on those counts after the prosecution's appeal. See 480 A.2d at 1048 n. 1. If the United States is correct that a trial judge may reverse a midtrial directed verdict grant any time before final judgment, then the trial judge in *Smalis* could have reinstated the acquitted charges against the defendants *after* this Court's decision. The United States' argument, if accepted, would have allowed the prosecution to go back to the trial judge in *Smalis* after this Court's decision and obtain precisely the relief, postacquittal factfinding proceedings, that this Court unanimously held the Double Jeopardy Clause forbids. The United States' argument therefore proves too much.

Fourth, the United States' argument would make a criminal defendant's protection from postacquittal factfinding proceedings turn on the irrelevant issue of

whether other charges still remain after the acquittal. As *Smalis* itself demonstrates, however, the Double Jeopardy Clause bars postacquittal factfinding on an acquitted charge even if the defendant faces further proceedings on related charges. See 476 U.S. at 141 n. 1 (recognizing that defendants in *Smalis* faced other charges but "[t]hese other charges are not relevant to this petition"); see also *Green*, 355 U.S. at 187 (holding that defendant facing new trial after successful appeal of second-degree murder conviction cannot be tried for first-degree murder charge where jury implicitly acquitted defendant of first-degree murder).

Ultimately, the United States' attempt to distinguish *Smalis* fails because it confuses finality for purposes of trial procedure with finality for purposes of the Double Jeopardy Clause. As *Smalis* illustrates, these two concepts of finality are different. See also *Clay v. United States*, ___ U.S. ___, 123 S.Ct. 1072, 1076 (2003) ("Finality is variously defined; like many legal terms, its precise meaning depends on context"). A "ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt" is final because it is "an acquittal under the Double Jeopardy Clause," *Smalis*, 476 U.S. at 144, even when, as in *Smalis* itself, the trial will continue on other charges and the judge believes his ruling can be reconsidered under local procedural rules. An acquittal does not become non-final for Double Jeopardy Clause purposes just because the judge could reconsider other midtrial rulings.

As discussed in detail in parts D and E of this argument, *infra*, the United States' position would also allow the trial judge and the prosecutor to whipsaw a defendant in violation of the core principles of the Double Jeopardy Clause. Under the view of the United States, a trial judge

could resurrect a previously dismissed charge after the defendant has fully committed herself to presenting evidence responsive only to the remaining charges or, even worse, after the defendant has presented evidence helpful to the remaining charges but damaging as to the previously dismissed charge. This is precisely the dilemma that Respondent faced as a result of the trial judge's action.

The United States heavily relies on *Swisher v. Brady*, 438 U.S. 204 (1978), for its argument that a trial judge may reverse his or her own grant of directed verdict later in the trial, Brief for United States at 18-21, but *Swisher* is inapposite to this case. In *Swisher*, this Court upheld a Maryland scheme in which a juvenile court judge could reject a master's report recommending acquittal and instead enter a finding of guilt. According to the United States, *Swisher* is analogous to this case because the decision of the juvenile court judge to reject the master's proposed acquittal and enter a finding of guilt is similar to a trial judge reversing his own directed verdict later in the trial. The United States overlooks the fact, however, that it was crucial to the outcome in *Swisher* that the master *lacked the power to acquit* the juvenile. As this Court explained, "[It] is for the State, not the parties, to designate and empower the factfinder and adjudicator. And here Maryland has conferred these roles only on the juvenile court judge." *Id.*, 438 U.S. at 216. In so holding, this Court distinguished *Kepner*: "The differences between the present case and *Kepner* are material. There the trial judge was authorized to try serious criminal cases and enter judgment, either of acquittal or conviction. The Philippine trial judge did not serve as an 'assistant' or master of the Philippine Supreme Court for the purpose of

making proposed findings to the appellate judges." *Swisher*, 438 U.S. at 217 n. 15.

The key to the result in *Swisher*, then, is not that the process there amounted to one continuous proceeding but that the juvenile judge's decision could not possibly amount to postacquittal factfinding since the master *could not acquit* the juvenile. Here, the trial judge, like the trial judges in *Kepner*, *Fong Foo*, *Martin Linen*, and *Smalis*, and unlike the master in *Swisher*, did have the power to acquit Respondent and did so. The United States' heavy reliance on *Swisher* is therefore misplaced.

In sum, the Michigan Court of Appeals and the Michigan Supreme Court were both correct in concluding that *Smalis* bars a trial judge from reversing a directed verdict grant later in the trial. If they had ruled the other way, that decision would have been contrary to, or an unreasonable application of, this Court's precedents.

D. A midtrial acquittal, if not immediately reversed, terminates jeopardy on the acquitted counts.

Petitioner, unlike the United States, at least implicitly concedes that the absence or presence of further trial proceedings after a midtrial directed verdict grant may be relevant to determining whether jeopardy had terminated. Petitioner's Brief at 28.[9] Petitioner therefore argues that when, as in *People v. Vilt*, 457 N.E.2d 136 (Ill. Ct. App.

[9] Petitioner overlooks, however, that further proceedings did occur before the trial judge reversed his directed verdict grant. See part E, of this argument, *infra*.

1983), a trial judge announces a directed verdict and then retracts it "practically in the same breath," the defendant has not been exposed to a Double Jeopardy violation. Petitioner's Brief at 38-40. Petitioner concludes that "a rule that a defendant is acquitted as soon as granting words are spoken is both unjust and unworkable." *Id.* at 40.

Respondent, however, has never advocated any such rule and does not do so now. Respondent has no quarrel with the result in *Vilt* and several other cases in which lower courts have held that a directed verdict grant did not amount to an acquittal when it was *immediately* reversed. See, e.g., *Byrne*, 203 F.3d at 673-675 (finding no double jeopardy violation where prosecutor "immediately" moved for reconsideration and trial judge "made it clear that her ruling was not final in the course of the same colloquy in which she announced the decision").

Consistent with *Byrne* and *Vilt*, most other lower courts, including courts from those same two jurisdictions, have concluded from this Court's precedents, including *Smalis*, that there is a bright line that prohibits a trial judge from reversing a midtrial acquittal if any further proceedings have occurred or a recess has been taken after the grant of the directed verdict. See, e.g., *Blount*, 34 F.3d at 868-869 (judge's oral grant of directed verdict, followed by presentation of defense evidence, precluded reconsideration next morning); *Millanes*, 885 P.2d at 109-111 (judge could not reverse directed verdict grant when prosecution moved for reconsideration after recess); *Brooks*, 827 S.W.2d at 121-123 (judge's oral grant of directed verdict at close of prosecution's case precluded reversal at close of defendant's case); *Caldwell*, 803 So.2d at 841 (judge could not reverse directed verdict after lunch break and hearing defense case); *Henry*, 769 N.E.2d at 41-44 (judge could not reverse oral directed verdict grant after "short recess" and further argument); *Lowe*, 744 P.2d at 856-858 (judge who orally granted directed verdict motion could not reverse decision next morning even though no trial proceedings occurred in interim); *Barnes*, 9 S.W.3d at 647-651 (Mo. Ct. App. 1999) (judge could not reverse directed verdict after defendant presented evidence); *Blacknall*, 672 A.2d at 1173-1176 (judge could not reverse directed verdict after lunch recess and defendant's testimony).

This bright line rule is consistent with the other rules that precisely mark the points at which jeopardy attaches and terminates. Thus, jeopardy attaches at the moment the jury is sworn, see *Crist v. Bretz*, 437 U.S. 28, 38 (1978), or, in a bench trial, at the moment the first witness is sworn. See *Serfass v. United States*, 420 U.S. 377, 388 (1975). Since jeopardy terminates at the moment of "the discharge of the jury upon returning a verdict of acquittal," *United States v. Jenkins*, 420 U.S. 358, 369 n. 13 (1975), *overruled on other grounds by United States v. Scott*, 437 U.S. 82 (1978), and since a directed verdict grant is equivalent to a jury acquittal, see *Richardson*, 468 U.S. at 325 n. 5; see also *Smalis*, 476 U.S. at 145 ("whether the trial is to the jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause"), it follows that jeopardy terminates after a directed verdict is announced and, if appropriate, clarified or confirmed.

As the lower court cases discussed above confirm, a prosecutor may ask a judge who has just announced a

directed verdict for an *immediate* clarification or reconsideration, just as the prosecutor may move for *immediate* clarification of a jury verdict of acquittal or for polling of the jury. Cf. Fed. R. Crim. P. 31(d) (providing that court or party may request polling of jury "before the jury is discharged"). However, jeopardy terminates after a directed verdict once the parties have moved on to other matters or a recess has been taken, just as jeopardy terminates when the jury's verdict has been accepted and the jury has been discharged. When the judge and the parties move on to other matters or take a recess after a directed verdict grant, that action clearly signals that any questions as to the content or validity of the judge's acquittal have been resolved, exactly as the discharge of the jury clearly signals that any questions as to the content or validity of the jury's acquittal have been resolved.

While logical consistency is valuable, the bright line the courts have drawn between immediate reversals of directed verdict grants and reversals later in the trial is especially important because that line serves to protect the core values of the Double Jeopardy Clause. As this Court explained in *Green*, the Double Jeopardy Clause was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." 355 U.S. at 187. "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 187-188.

During a continuing criminal trial, these hazards are particularly acute. When the judge acquits a defendant of some, but not all, of the counts against her at the close of the prosecution's case, she is absolutely entitled to rely on that acquittal as she makes what may be the most crucial decisions of her life with regards to the remaining charges. She and her attorney must decide, among many other potential issues: (1) the motions to make, if any, regarding the remaining charges; (2) the witnesses to call, if any, to testify to the remaining charges; (3) whether she should testify herself regarding the remaining charges; (4) whether she should plead guilty to the remaining charges or seek to negotiate a plea bargain; (5) the special jury instructions, if any, she should request for the remaining charges; and (6) the tangible evidence, if any, she should present regarding the remaining charges.

A defendant must make all or most of these crucial decisions during the short interval of time, typically a recess, between when the judge decides the directed verdict motion and the beginning of the defendant's case. The defendant cannot possibly make these decisions in an intelligent manner if she must also wonder whether the trial judge might, at some point later in the trial, bring back the charges that were just dismissed.

Therefore, once a directed verdict of acquittal is announced and the parties move on to other matters or take a recess, the defendant must be able to rely on that acquittal as she litigates those other matters. If the trial judge is free to resurrect charges previously dismissed, the defendant cannot safely make any decisions as to trial procedure or strategy without running the risk that those decisions will backfire if and when the judge later reinstates the acquitted charges. She must therefore remain in

a heightened state of "anxiety and insecurity" throughout the trial and "even though innocent [she] may be found guilty." *Green*, 355 U.S. at 187-188. If the charges are indeed brought back later in the trial, she also endures "repeated attempts to convict an individual for an alleged offense." *Id.* at 187.

This Court has specifically recognized that an overnight recess is a critical time during a criminal trial because:

> It is common practice for an accused and counsel to discuss the events of the day's trial. *Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed*. The lawyer may need to obtain from his client information made relevant by the day's testimony, or may need to pursue inquiry along lines not fully explored earlier.

Geders v. United States, 425 U.S. 80, 88 (1976) (emphasis added); see also *Perry v. Leeke*, 488 U.S. 272, 284 (1989) (matters normally discussed during overnight recess include "availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain").[10]

[10] In *Perry*, this Court upheld a court order preventing a defendant who was testifying in his own defense from speaking with his lawyer during a 15-minute recess only because such an order may be necessary to prevent the defendant from discussing his testimony while in progress. *Id.* at 283-284. Even for such a short recess, however, this Court recognized that it would be appropriate to permit the defendant to speak with counsel on matters other than his ongoing testimony. *Id.* at 284 & n. 8.

The core values of the Double Jeopardy Clause protect a defendant who must make difficult, even life-altering, decisions during an ongoing criminal trial or during recesses in that trial. If the defendant has been acquitted of some charges, she must be able to make those decisions about the remaining charges without having to face the possibility that those decisions will blow up in her face once the judge brings back the acquitted charges.

Most of the courts faced with this problem have thus correctly held that a directed verdict of acquittal, once rendered, may not be reversed later in the trial. That bright line is consistent with the other bright lines drawn for the attachment and termination of jeopardy, and it protects the values of the Double Jeopardy Clause. Further, as most of the lower court decisions cited by Petitioner demonstrate, there has been no difficulty in administering such a rule. An immediate reversal of a directed verdict grant may be permissible, but a reversal later in the trial is not.

E. Respondent was subjected to postacquittal factfinding proceedings in violation of the Double Jeopardy Clause when the trial judge reversed the acquittal on the first-degree murder count later in the trial.

Applying these principles to this case is straightforward. On March 31, 1992, at the close of the prosecution's case and after argument of counsel, the trial judge granted Respondent's motion for a directed verdict on the first-degree murder count, finding that the prosecution had failed to prove the essential element of premeditation. J.A. 12-13. The trial court recorded the directed verdict grant in the court's official docket entries for March 31, 1992.

J.A. 1. Respondent's jeopardy on the first-degree murder count therefore terminated on March 31, 1992.

After the directed verdict grant, the attorneys and the court immediately moved on to discuss and litigate a variety of other trial matters, including whether both juries would be present as each defendant presented his case, the order in which the defendants would present their cases and the expected length of the testimony, the procedure by which the prosecutor would formally announce to each jury that he had completed his case, and whether certain witnesses would be allowed in the courtroom during portions of the trial unrelated to their testimony. J.A. 13-18. As Respondent and his counsel litigated and made decisions on those other matters, he had already been acquitted of first-degree murder. The judge and the parties had moved on to other matters, and he was entitled to rely on the acquittal as he made decisions on how to defend the remaining charges.

After those issues were resolved, Respondent was removed from the courtroom for the day. J.A. 18. Thus, when Respondent left court on March 31, 1992, he knew he had been found not guilty of first-degree murder, an understanding his attorney also shared. See J.A. 34 ("it was my firm impression and belief that the Court had made a ruling").

Only after Respondent had been removed did the prosecutor mention for the first time that he would like to "make a brief restatement in terms of the First Degree Murder" the following morning. J.A. 18. The judge replied, "Yes, I'll be glad to hear it. Sure, I'm always glad to hear people." *Id.* The prosecutor's statement certainly did not amount to a motion for reconsideration, nor did the judge

indicate that his earlier decision was subject to reconsideration. Even if the prosecutor's comment could somehow be construed as a motion for reconsideration, it was too late. Respondent and his counsel had moved on to other issues after the acquittal, a significant amount of time had passed, and Respondent was no longer even present. By the time the prosecutor made his comment, Respondent's jeopardy on the first-degree murder count had terminated.

After this brief exchange, trial recessed for the day, with Respondent's defense to the remaining charges to be presented the following day. Thus, Respondent and his attorney had an overnight recess to plan his defense to the remaining charges and to make all of the necessary strategic and tactical decisions inherent in presenting a defense. See *Geders*, 425 U.S. at 88. Respondent therefore had to make extremely important decisions, namely, how to defend a second-degree murder charge the next day, while laboring under the belief that the first-degree murder charge was gone forever. The core principles of the Double Jeopardy Clause must entitle a defendant who has just been acquitted of some charges to plan his defense to any remaining charges secure in the knowledge that his decisions cannot result in his conviction on the acquitted charges.

This Court has consistently recognized that jury acquittals and directed verdicts are equivalent. See, e.g., *Richardson*, 468 U.S. at 325 n. 5. Therefore, the events that occurred on April 1 and April 2, 1992, are the constitutional equivalent of bringing a jury back the day after it has returned a not guilty verdict, allowing the prosecutor to make an improved closing argument, forcing the defendant to present his case and decide whether to testify without telling him the identity of the highest charge he

might face, and allowing the jury to change its mind and convict the defendant the day after that.

On April 1, 1992, the prosecutor delivered a lengthy argument to the judge that there was sufficient evidence of premeditation to survive a directed verdict motion. J.A. 21-33. Even after hearing this argument and the objections of Respondent and his codefendants that the Double Jeopardy Clause barred reconsideration, J.A. 32-36, the trial judge still did not reverse his acquittal. Instead, he took the matter under advisement. J.A. 42-43.

Thus, when Respondent presented his entire defense case and testified in his own defense on April 1, 1992, he *still* stood acquitted of first-degree murder. At that point, Respondent was in a completely untenable position if, as the judge ultimately ruled, he could bring back the first-degree murder charge.

At the time Respondent testified, the highest charge against him was second-degree murder, but the jury would also be allowed to consider the lesser charge of manslaughter.[11] Respondent therefore could choose to testify in attempt to persuade the jury that he had been provoked or that he was aware of the risk of death and had acted in a reckless fashion, but doing so obviously ran the risk that the jury could use the very same testimony to establish that Respondent had thought about his actions beforehand, i.e., had premeditated. When making his most fundamental decision to testify in his own defense,

[11] In fact, one of Respondent's codefendants was convicted of manslaughter. Pet. App. 14a.

Respondent was entitled to rely on the acquittal he had received the day before.

Finally, the next day, April 2, 1992, one day after Respondent had presented his entire case and testified himself, the trial judge reversed the directed verdict grant and reinstated the first-degree murder charge. J.A. 45-46. By that point, two full days of further trial proceedings had occurred from the time that Respondent had been acquitted.

A defendant is not required to demonstrate prejudice, beyond the prejudice inherent in being tried twice for the same offense, to obtain relief for a Double Jeopardy Clause violation. In *Smalis*, for example, this Court granted relief without considering whether a reversal of the acquittal would have impaired the defendants' ability to defend themselves.

Similarly, Respondent does not have the burden of demonstrating specific prejudice to his defense to obtain relief. Even if such a showing were required, however, it is clear that Respondent has established that the Double Jeopardy Clause violation in this case was far more prejudicial than the one in *Smalis*. If this Court had allowed the prosecution in *Smalis* to obtain a reversal of the demurrer grant, the defendants would at least have known with certainty the identity of the charges against them when their trial resumed. Respondent, by contrast, was forced to prepare to defend himself, make strategic choices, litigate procedural motions, and testify in his own defense, all while reasonably believing that he had been finally acquitted of first-degree murder.

On this record, it is clear that Respondent was acquitted of first-degree murder on March 31, 1992, and that he

was subsequently subjected to "postacquittal factfinding proceedings going to guilt or innocence" in violation of the Double Jeopardy Clause. *Smalis*, 476 U.S. at 145. Respondent is therefore entitled to have his first-degree murder conviction reduced to second-degree murder and to be resentenced accordingly.

CONCLUSION

Respondent Duyonn Andre Vincent requests that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

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Supreme Court, U.S.
FILED
APR 14 2003

No. 02-524

In The
Supreme Court of the United States

JANETTE PRICE,

Petitioner,

v.

DUYONNE ANDRE VINCENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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I. The standard of review of 28 U.S.C. § 2254 is a constraint on the federal courts' power to grant relief, and it must be applied in this case.

Respondent claims this Court should not apply the standard of review of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), to this case for two reasons: (A) because Petitioner "never challenged in either the Sixth Circuit or this Court the district court's application of the AEDPA standard of review to the Michigan Supreme Court's legal conclusions," (See Respondent's Brief, p. 15); and (B) because "Respondent has no burden to show that a state court decision ***in his favor*** is contrary to, or an unreasonable application of, this Court's precedents." (See Respondent's Brief, p. 25).

A. Petitioner did challenge the district court's application of the AEDPA standard of review.

Respondent's claim on the first point is wrong on the facts and the applicable law. Respondent appears to be arguing: because Petitioner characterized the question before the Michigan Supreme Court as a legal issue, rather than a factual one, the AEDPA does not apply to this habeas action. Petitioner clearly raised the applicability of the habeas standard before the Sixth Circuit where the two arguments raised in Petitioner's brief on appeal in that court were as follows:

> I. The Michigan Supreme Court's conclusion that the trial court's statements were ambiguous was not based on an unreasonable determination of the facts.

II. Even if the trial court had granted Petitioner's motion for directed verdict, but reversed itself before informing the jury or conducting further proceedings, clearly established Supreme Court law does not entitle Petitioner to habeas corpus relief.

[Final Brief of Respondent-Appellant, p. 2, *Vincent v. Jones*, 292 F.3d 506 (6th Cir. 2002)].

More important, Respondent's argument misperceives the nature of federal habeas review under the AEDPA. It is not Petitioner's burden to affirmatively plead the restrictions imposed by the statute as a condition precedent to prevent the federal courts from releasing state-convicted felons. The standard of review in 28 U.S.C. § 2254 is not a benefit to be claimed by the state, it is a limitation imposed by Congress on the power of the federal judiciary. The statute provides that relief *shall not be granted* with respect to any claim that was adjudicated on the merits in state court proceedings *unless* the adjudication of the claim resulted in a decision that was contrary to, or an unreasonable application of, clearly established United States Supreme Court law. 28 U.S.C. § 2254(d)(1) (emphasis added).

As this Court stated in *Williams v. Taylor,* 529 U.S. 362, 412 (2000): "2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *See also, Woodford v. Visciotti,* ___ U.S. ___, 123 S. Ct. 357, 154 L.Ed.2d 279 (2002), where this Court refers to the "limits imposed on federal habeas review by 28 U.S.C. § 2254(d)." The lower federal courts exceeded the limits imposed by

Congress in the AEDPA by granting habeas relief in this case and this Court must reverse.

In the Court of Appeals, as in this Court, Petitioner asserted that the Michigan Supreme Court's decision in this case was based on a factual conclusion, that Vincent's motion was not granted by the trial court. If this Court accepts that contention, the case is governed by the factual determination standard of § 2254(d)(2), and habeas relief is available only if this Court finds that the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented." Conversely, even if this Court adopts the position that the Michigan Supreme Court's decision was a legal conclusion, that the words of the trial judge on March 31 did not constitute an acquittal for purposes of the Double Jeopardy Clause, then that question was adjudicated on the merits in the state court. The AEDPA allows relief only if the state court decision was "contrary to or an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A federal court cannot, as the Sixth did here, disregard the deferential review mandated by Congress.

Finally, Respondent's burden to meet the mandated statutory grounds for habeas relief is not altered because Petitioner also argued in the Sixth Circuit that the state is entitled to the presumption of correctness of factual findings in § 2254(e)(1) of the statute:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

> shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In the present case, in which a single factual determination by the state court resolves the claim, the application of the presumption is dispositive if not rebutted.[1] As this Court concluded in *Miller-El v. Cockrell*, ___ U.S. ___, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003), to secure relief, a habeas petitioner must show that the court's factual finding was incorrect by clear and convincing evidence under § 2254(e)(1) and that the court's decision was objectively reasonable in light of the record under § 2254(d)(2). *Id.* slip op. at 47. Therefore, the fact that the state grounded its claim regarding the factual basis for the state court's decision on § 2254(e)(1) in the appeals court does not relieve Respondent of the burden mandated by the statute. There is nothing in this record or in the language of the AEDPA which would allow Respondent to avoid the burden of showing entitlement to relief.

[1] Respondent attempts to rebut the factual conclusion with a docket entry. It must be presumed that the state court considered the docket entry, brought to its attention on reconsideration, and was unconvinced. *People v. Vincent*, 456 Mich. 1201 (1997). Further, as discussed in Petitioner's brief, p. 27, the docket entry does not constitute clear and convincing evidence since the entries for April 1 and 2, 1992 do not accurately reflect what happened in court on those dates. The March 31 docket entry is, therefore, insufficient to rebut the presumption of correctness of the state court's conclusion that the motion was not granted.

B. There was no state court decision in Respondent's favor.

Respondent wrongly contends that the standard of review of § 2254(d)(1) is not applicable. Respondent argues the Michigan Supreme Court held, in his favor, that the trial court could not have reconsidered the motion once granted. Respondent is wrong for two reasons. First, Respondent did not receive a favorable decision on that issue. Second, the "decision" referred to in § 2254(d)(1) is the decision on the merits of the claim denying relief.

According to Respondent, the Michigan Supreme Court found that if the trial court granted the motion on March 31, further proceedings would have been barred. Respondent relies on the following statement from that Court's opinion:

> "Characterizing the court's comments as a directed verdict would compel us to overturn the Defendant's convictions." [*People v. Vincent*, 455 Mich. 110, 119-120, 565 N.W.2d 629 (1997)]

Respondent's claim ignores footnote 4 of the Michigan Supreme Court's opinion specifically stating that it was *not* reaching that issue:

> n4 Because we have determined that in this case a judgment was not rendered, we need not reach whether or under what circumstances the judge can reverse or correct a ruling. However, we are aware that there is a split of authority among our sister states on this particular question. Compare *United States* v. *Washington*, 48 F.3d 73, 79 (CA2, 1995) ("oral grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment'"

[citation omitted]); *In Re Lionel F.*, 76 N.Y. 2d 747, 749; 559 N.Y.S. 2d 228; 558 N.E.2d 30 (1990) ("There is no constitutional impediment to a court's power to modify its decisions, provided such a modification does not subject an individual to double jeopardy" [citation omitted]); *People v. Dist Court,* 663 P.2d 616, 621 (Colo, 1983) ("we see no reason why the double jeopardy prohibition should preclude a trial judge from correcting during the trial itself an erroneous ruling on a motion for a judgment of acquittal when no threat of retrial would arise from the correction and the accused has suffered no demonstrable prejudice by reason of the correction"); *State v. Iovino,* 524 A.2d 556, 560 (RI, 1987) ("the corrected ruling by the trial justice did not in any way inhibit defendant's presentation of any evidence that he might have chosen to adduce in respect to the greater as well as the lesser included offenses"); with *Watson v. State,* 410 So.2d 207, 209 (Fla, 1982) ("the ruling of the trial judge made the day before, without any indication that the matter was still under consideration, had progressed toward finality beyond the point that would permit its retraction or correction"); *Brooks v. State,* 308 Ark. 660, 668; 827 S.W.2d 119 (1992) ("dismissing the robbery charge and then reinstating it at the conclusion of all evidence could well have curtailed the appellant's ability to present a full defense to this charge"). [*Id.* at 118, Pet. App. p. 33a].

Viewing the statement that Respondent relies on in conjunction with the footnote expressly declining to reach the issue, it is clear that when the Michigan Supreme Court stated, "characterizing the court's comments as a directed verdict would compel us to overturn the

defendant's conviction," it was merely restating the unremarkable proposition that a directed verdict is an acquittal under Michigan law. Respondent's claim that the Michigan Supreme Court "affirmatively rejected" the proposition that a trial judge could alter a ruling in some circumstances is a gross misreading of the court's opinion. The Michigan Supreme Court did not rule on the issue because it concluded that it did not have to.

Moreover, the AEDPA does not direct the federal courts to parse state court opinions, applying the deferential standard only to "issues" forming the basis of state court decisions and declining to apply deference if the state court's decision relied on the wrong "issue." The AEDPA prohibits relief on any claim adjudicated on the merits unless the adjudication of the claim resulted in a decision that was contrary to, or an unreasonable application of, this Court's clearly established law. Respondent's claim was that the trial court violated his right under the Double Jeopardy Clause not to be tried twice for the same crime. That claim was adjudicated on the merits by the Michigan Supreme Court, and the decision the court made was that Respondent's right not to be placed twice in jeopardy was not violated. The federal habeas statute provides the authority to reject that state court decision *only* under the standard of § 2254(d).

The parties agree that the Michigan Supreme Court concluded that Vincent's double jeopardy right was not violated because he was not acquitted on March 31. The Michigan Supreme Court saw the issue as requiring the following analysis: 1) was the motion for directed verdict granted on March 31 and, 2) if so, could the trial judge change his mind the next morning or was the granting of the order an acquittal immediately? The state court

resolved the issue on the first question, concluding that the motion was not granted and therefore, did not reach the second question of reconsideration.

Even if this Court agrees with Respondent that only a single, all-encompassing question was at issue, the federal courts are still constrained by the AEDPA. The statute does not require the federal court to endorse a state court opinion with its stamp of approval, only to determine whether the decision denying relief was contrary to, or an unreasonable application of the Supreme Court's prior decisions. Under Respondent's formulation, similarly situated prisoners could receive different outcomes in federal habeas review based solely on the way the state court framed its opinion. The state court decision in this case was that Respondent's double jeopardy rights had not been violated, accordingly the federal courts were obligated to observe the constraints imposed by the AEDPA on its judicial power to grant relief in habeas cases.

II. The state court decision was not contrary to clearly established United States Supreme Court law.

A. The trial court's decision was not contrary to *Sanabria v. United States*, 437 U.S. 54 (1978).

Respondent's brief states as follows:

> The trial judge took the position, *as a matter of double jeopardy law* that although he had made a ruling and granted a motion for directed verdict, such a ruling does not ripen into an acquittal until the judge informs the jury. J.A. 33, 34, 36, 42-43. The trial judge's position was wrong,

> *as a matter of double jeopardy law,* because it is directly contrary to *Sanabria v. United States,* 437 U.S. 54, 64 n. 18 (1978), where this Court held that, [i]t is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal. [See Respondent's brief p. 16]

Assuming, for the sake of argument, the accuracy of Respondent's description of the trial judge's position, his contention that this position was contrary to the "holding" in the *Sanabria* footnote is wrong. As an initial matter, the notion that this Court announces its holdings in footnotes is questionable at best. See *Kovacs v. Cooper,* 336 U.S. 77, 90-91 (1949) (concurring opinion of Frankfurter, J.). More important, the Court in *Sanabria* neither considered nor decided whether a trial judge could reconsider a grant of a motion for directed verdict or whether the fact that the jury had not been informed of the grant would allow reconsideration. The trial court in *Sanabria* had, in fact, concluded that its decision was subject to reconsideration, but declined to alter its ruling. 437 U.S. at 59-60 and n. 9. Therefore, the reconsideration itself was not at issue. The issue in *Sanabria,* as in most double jeopardy cases reaching this Court, was whether the government was entitled to appeal an acquittal. The government claimed that the defendant's retrial on a theory of participating in a criminal gambling enterprise involving numbers betting would not violate the Double Jeopardy Clause where defendant had been acquitted of participating in the same enterprise involving horse racing. This Court held that although the trial court judge had made an erroneous ruling excluding evidence of numbers betting and had

then entered an order of acquittal, the defendant could not be retried, and therefore the prosecutor's appeal was barred. The footnote only referred to the fact that the defendant had been acquitted by the order of the trial court judge, and not by a verdict of the jury. *Sanabria* has no particular applicability to this case. Because the trial court's conclusion did not apply a rule that contradicts the governing law in *Sanabria*, and did not confront a set of facts materially indistinguishable from *Sanabria*, the state trial court's position cannot be termed "contrary to" *Sanabria*. See, *Williams v. Taylor*, 529 U.S. 405-406.

B. The Michigan Supreme Court's decision was not contrary to *Smalis*.

Respondent contends that the Michigan Supreme Court's decision that the trial court did not grant a directed verdict was a legal conclusion contrary to *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Petitioner claims that the state court's decision was based on a factual conclusion that the motion was not granted. This Court will resolve the issue whether the state court decision was based on a factual determination or was a legal conclusion.

Resolving the nature of the question presented to the Michigan Supreme Court does not end the inquiry, however. Whether the question is viewed as a legal or a factual one, it is the *resolution* of the question that the federal court must consider on habeas review. Therefore, even if this Court accepts Respondent's contention that the question is one of law and not one of fact, *Smalis* provides no framework whatsoever for resolving the question whether the trial court did or did not acquit the Respondent. Respondent states that *Smalis* holds that the

"characterization of a trial judge's words and actions as a matter of double jeopardy law is by definition, a legal matter." (See Respondent's brief, p. 15). What the *Smalis* Court actually said, in a footnote, is "the Pennsylvania Supreme Court's characterization as a matter of double jeopardy law, of *an order* granting a demurrer is not binding on us." *Smalis, supra* 476 U.S. at 144, n. 5. It was the legal effect of the order that was at issue in *Smalis*, not the resolution of ambiguous "words and actions." *Smalis* provides no guidance at all in construing "words and actions" to determine whether an order was made. Therefore, the Michigan Supreme Court's resolution of the effect of the trial court's words cannot be contrary to *Smalis* because *Smalis* does not announce a rule for resolving such ambiguities.

The question in this case, unlike the question in *Smalis*, is when does an acquittal occur? The answer to that question is not clearly established. A rule that the grant of a motion for directed verdict is an acquittal immediately, as soon as the granting words are spoken, is unworkable in practice. Respondent concedes the point, concluding that if a trial court immediately reverses the grant of a motion, it does not constitute an acquittal. (See Respondent's Brief, Argument II-D, pp. 39-45). Respondent instead proposes a rule that would hold that "jeopardy terminates after a directed verdict is announced and, if appropriate, clarified or confirmed." (*Id.*, p. 41). In Respondent's formulation a prosecutor may immediately request reconsideration, but "if the parties have moved on to other matters or a recess has been taken" jeopardy terminates. (*Id.*, p. 42). This proposed "bright line rule" is not found in *Smalis*. Respondent's proposal that this Court adopt this rule constitutes a remarkable admission that a

rule governing the issue presented on habeas review was not, and is not, clearly established by this Court. Therefore, under the standard of review of 28 U.S.C. § 2254, the state court's decision cannot be contrary to, or an unreasonable application of, United States Supreme Court law. On the other hand, even under Respondent's proposed rule, this case arguably comes within that proposal. Here the prosecutor asked the court for further consideration a mere five transcript pages after the trial court indicated its inclination to grant the motion. [Joint App. pp. 13-18]. Counsel for defendant Vincent understood the prosecutor's request:

> The Court: So the jury knows nothing about any of this.
>
> Mr. Odette: That's correct, they don't. I'm not disputing that but it's my firm impression when I left the court yesterday that there had been a ruling and that Mr. Stamos had indicated he'd like to have the matter reconsidered and I believe the Court said whatever. [Apx. pp. 33-34]

Because Respondent's counsel was well aware that the motion was not final the following morning, and because Respondent's counsel did not advocate for an immediate decision when the trial court took the motion under advisement on April 1, Respondent's theories regarding counsel's inability to prepare a defense is simply speculation. In addition, Respondent can direct this Court to no decision holding any such due process considerations are relevant to Double Jeopardy jurisprudence.

CONCLUSION

The decision of the Sixth Circuit must be reversed. The AEDPA standard requires reversal whether this Court determines that the Michigan Supreme Court's decision was based on a factual or a legal determination. If this Court adopts Respondent's position that the question decided by the Michigan State Supreme Court was a legal question, whether or not Respondent was acquitted by the words spoken by the trial judge, it is undisputed that there is no clearly established United States Supreme Court law regarding the moment an acquittal occurs and jeopardy terminates under the circumstances presented by this case. Accordingly, the limitation on the federal courts' power to grant relief imposed by 28 U.S.C. § 2254(d) requires this Court to reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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No. 02-524

In the Supreme Court of the United States

JANETTE PRICE, WARDEN, PETITIONER

v.

DUYONN ANDRE VINCENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling that grants a motion for a directed verdict of acquittal at the close of the prosecution's case.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Double Jeopardy Clause bars a trial court from reconsidering a ruling that grants a motion for a directed verdict of acquittal at the close of the prosecution's case. Because the Federal Rules of Criminal Procedure provide for the filing of a motion for judgment of acquittal after the government closes its evidence, Fed. R. Crim. P. 29(a), the question presented in this case arises in federal criminal trials. See, *e.g.*, *United States* v. *Baggett*, 251 F.3d 1087 (6th Cir. 2001), cert. denied, 534 U.S. 1167 (2002); *United States* v. *Byrne*, 203 F.3d 671 (9th Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88, 132-134 (2d Cir. 1999), cert. denied, 528 U.S. 1094 (2000). The United States there-

fore has a significant interest in the Court's disposition of this case.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. Respondent and his two co-defendants, Dameon Perkins and Marcus Hopkins, were charged with open murder and unlawful possession of a firearm in connection with a shooting death that occurred in a confrontation between two groups of youths at a high school in Flint, Michigan. Michigan law permits the State to charge a defendant with "open murder," leaving to the jury the determination whether the specific offense is first-degree or second-degree murder. See Pet. App. 53a n.3. On March 31, 1992, after the prosecution rested its case at trial, the defendants moved for a directed verdict of acquittal on the charge of first-degree murder, arguing that there was insufficient evidence of premeditation and deliberation. Pet. App. 2a-3a, 27a-28a, 53a.

The trial court considered the motion outside the presence of the jury. After hearing argument from both sides, the court responded:

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[1] The United States will not address the first question presented by the petition for a writ of certiorari, which concerns whether, for purposes of determining the appropriate standard of review of respondent's habeas claim, the Michigan Supreme Court's conclusion that the trial court had not rendered a directed verdict of acquittal constituted a determination of fact or a conclusion of law. See 28 U.S.C. 2254(d) and (e)(1).

> Well, my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else * * * [b]ut I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgment was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

Pet. App. 3a. The court then took up several unrelated matters with counsel. At the end of the colloquy, before the proceedings adjourned for the day, the prosecutor requested an opportunity to make a "brief restatement" the next morning on the sufficiency of the evidence supporting the charge of first-degree murder, stating that he wanted to "find some law" on the issue. The trial court responded that it would be "glad to hear" the prosecutor's further argument. The trial docket for the day contains an entry stating, "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER"; but the court issued no written or formal order to that effect. *Id.* at 3a, 15a, 28a-29a, 54a-55a.

The next morning, April 1, 1992, the prosecutor, as planned, presented additional argument asserting that the evidence of first-degree murder was sufficient to

justify submitting the charge to the jury. Defense counsel responded that the court had granted a directed verdict of acquittal on that charge the previous day and was barred by the Double Jeopardy Clause from reconsidering its ruling. The court disagreed, emphasizing that the proceedings on the motion were taking place outside the presence of the jury and observing, "I consider things in great length * * * [and] I try to be open about things and flexible." Defense counsel turned to the merits of the sufficiency issue on premeditation, but later reiterated that double jeopardy principles precluded the court from reconsidering its decision to direct a verdict of acquittal. The court responded, "I haven't directed a verdict to anybody." Defense counsel then stated that the court had "granted our motion," prompting the court to reply, "[o]h, I granted a motion, but I have not directed a verdict." Pet. App. 4a-5a, 16a, 29a-30a, 55a-57a.

After hearing further argument from the prosecutor in support of submitting the charge of first-degree murder to the jury, the trial court decided that it would reserve its ultimate ruling on the defendants' motion for a directed verdict:

> Well, I'm going to consider the argument that Counsel has made. And Counsel should certainly be aware of the fact that there has been no harm that has come about by the Court[']s ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel. I'm going to reserve a ruling on it. We'll come back to it a little later on after I hear a good more and think a little bit more about it. Now I'm basing, of course, the decision

> upon what we have up until such a time as the motion's being made. But I'll reserve the ruling.

Pet. App. 5a. The trial resumed that afternoon, with respondent presenting his own testimony and that of one witness. *Id.* at 5a, 57a.

The following morning, April 2, 1992, respondent and his co-defendants rested their cases. The court then informed the parties that it had "reconsidered the ruling that the Court earlier made and [had] decided to let the jury make its own determination on the Degrees. That's where we'll stand now so we'll let them have all those issues submitted to them, First, Second, Manslaughter and you can go on from there." The jury found respondent guilty of first-degree murder and felony firearm possession. Pet. App. 5a, 58a.[2]

2. Respondent and his co-defendants appealed, each arguing, *inter alia*, that the trial court was barred by the Double Jeopardy Clause from submitting the charge of first-degree murder to the jury. Pet. App. 14a-25a.

a. The three appeals were considered by separate panels of the Michigan Court of Appeals. Pet. App. 17a. The panels that heard the appeals of respondent's co-defendants rejected their double jeopardy claims and affirmed their convictions. *Id.* at 17a-19a. The panel that heard respondent's appeal reached the opposite conclusion, ruling that the trial court's remarks on March 31, 1992, amounted to an oral grant of a directed verdict on first-degree murder and that any further

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[2] The same jury found respondent's co-defendant Hopkins guilty of involuntary manslaughter and felony firearm possession. Respondent's remaining co-defendant, Perkins, was tried before a separate jury and was found guilty of second-degree murder and felony firearm possession. Pet. App. 58a n.5.

proceedings on that charge were prohibited by the Double Jeopardy Clause. *Id.* at 19a-25a.

b. The Michigan Supreme Court reversed the panel's decision in respondent's case. Pet. App. 26a-51a. The court began by explaining that an "acquittal" for double jeopardy purposes entails a "ruling" that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 34a (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). There had been no "actual resolution" in this case, the court determined, because the trial judge's "remarks did not sufficiently resolve anything." *Id.* at 36a n.6. In the court's view, the trial judge's statements from the bench on March 31, 1992, lacked sufficient "clarity and finality" to "be construed as an order." *Id.* at 35a. Those remarks, the court determined, were "no more than a judge thinking out loud," *id.* at 38a, were "clearly equivocal," and were akin to "an initial assessment of a possible future ruling," *id.* at 41a.

The court held that, "in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged." Pet. App. 42a. Here, the court found, the trial judge's comments "lack[ed] the requisite degree of clarity" to constitute a "final resolution," and "there was no formal judgment or order." *Ibid.* The court thus held that the "continuation of the trial and subsequent conviction" on the charge of first-degree murder did not violate the Double Jeopardy Clause. *Ibid.*

3. Respondent renewed his double jeopardy claim in a petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of Michigan.

a. The district court granted respondent relief. Pet. App. 52a-77a, 78a-83a. The court rejected the conclusion of the Michigan Supreme Court that the trial judge's remarks on March 31, 1992, were tentative or inconclusive, finding that the judge had made a "determinative ruling on the sufficiency of the evidence" that amounted to an "acquittal on the first-degree murder charge for double jeopardy purposes." *Id.* at 72a. The court held, relying principally on this Court's decision in *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), that the trial judge was barred by double jeopardy from reconsidering his initial ruling and subjecting respondent to further trial proceedings on the charge of first-degree murder. Pet. App. 75a, 80a; see *id.* at 66a-68a, 71a.

b. The court of appeals affirmed. Pet. App. 1a-12a. After scrutinizing "the precise language" used by the trial judge in his oral statements on March 31, 1992, the court determined that the judge had orally granted the motion for directed verdict on first-degree murder. *Id.* at 10a-11a. The court held that the judge "was not entitled to reverse that decision later in the trial," *id.* at 12a, because the "Double Jeopardy Clause prohibit[ed] any further prosecution of the defendant for that crime," *id.* at 9a (citing *Martin Linen Supply*, 430 U.S. at 564, and *Smalis*, *supra*).

SUMMARY OF ARGUMENT

A trial court may reconsider a ruling that the evidence presented by the prosecution is insufficient to convict, because the court's interlocutory decision does not constitute a final judgment of acquittal within the

meaning of the Double Jeopardy Clause. Under the Double Jeopardy Clause, a final judgment of acquittal has a special status: once there is a judgment acquitting the defendant by finding the evidence insufficient to sustain a guilty verdict, the defendant may not be subjected to a new trial or to additional fact-finding proceedings. Accordingly, the prosecution may not appeal a judgment of acquittal when reversal would necessitate such proceedings. *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986).

Although *Smalis* bars an appeal from the grant of an acquittal at the completion of the prosecution's evidence, the trial court's reconsideration of its own ruling, as occurred in this case, raises distinct issues. At the time of an appeal—as was at issue in *Smalis*—the trial court necessarily will have reached a definitive resolution in favor of acquittal and would lack jurisdiction to alter its ruling. But while the case remains in the trial court, the settled rule is that the court possesses an inherent authority to reconsider and correct its interlocutory rulings. And when a court indicates a willingness to reconsider its ruling granting an acquittal, the effect is to render the initial ruling non-final and inconclusive. In that situation, the prohibition against post-acquittal trial proceedings recognized in *Smalis* is inapplicable: the purpose of the reconsideration is to determine whether the defendant in fact will be acquitted of the charge. The court's initial mid-trial ruling does not represent the final resolution of the issue necessary to constitute an acquittal.

A trial court's reconsideration of its grant of an acquittal at the close of the prosecution's evidence offends no double jeopardy values. Because reinstatement of the charge would merely lead to completion of the initial trial, the prosecution would have no opportunity to improve its case or wear down the defendant by initiating a second trial. For the same reason, the defendant would retain his right to resolution of the charges against him by the initial tribunal— jury or judge—before which jeopardy has attached. Moreover, the burdens on the defendant from continuing the trial to completion are no greater than if the trial court had reserved ruling on the motion for acquittal.

Prohibiting a trial court from reconsidering its erroneous grant of an acquittal, however, would compromise the societal interest in achieving just outcomes in criminal cases. It would allow a defendant to retain the benefit of an acquittal even though no court—including that one that initially awarded it—believes an acquittal to be justified. If a trial court were barred from reconsidering its initial grant of an acquittal, moreover, the attachment of double jeopardy protections would frequently turn on an effort to determine whether the court's extemporaneous remarks from the bench amounted to a concrete ruling in favor of an acquittal. That approach, as this case illustrates, is highly indeterminate, and it bears no relation to the basic purposes of the Double Jeopardy Clause.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A TRIAL COURT FROM RECONSIDERING ITS GRANT OF A MOTION FOR ACQUITTAL AT THE CLOSE OF THE PROSECUTION'S CASE

The court of appeals addressed respondent's double jeopardy claim by closely examining the trial judge's remarks on March 31, 2002, to determine whether they amounted to an oral grant of an acquittal. If so, the court held, that ruling was irrevocable and immune from reconsideration by the judge. The approach of

focusing on the precise language the trial judge used misdirects the double jeopardy inquiry.

Although this Court has held that the grant of an acquittal at the close of the prosecution's case may not be reviewed in an interlocutory appeal, *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), this case involves reconsideration of such a ruling by the trial court itself, not an appeal. Those two contexts are distinct from the perspective of the Double Jeopardy Clause. As the Court has explained, "the language of cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal' cannot be divorced from the procedural context in which the action so characterized was taken." *Serfass* v. *United States*, 420 U.S. 377, 392 (1975) (citation omitted). A court's reconsideration of its mid-trial grant of a motion challenging the sufficiency of the evidence should not be regarded as a judgment of acquittal under the Double Jeopardy Clause.[3]

A. The Grant Of An Acquittal May Not Be Appealed When Reversal Would Necessitate Further Trial Proceedings On The Charge

1. The Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187

[3] The Michigan Supreme Court and the court of appeals disagreed on whether the trial court in fact had granted respondent an acquittal. The second question presented by the petition for a writ of certiorari, however, presumes that the motion for acquittal was granted. Under the approach that we believe is correct, there would be no need to resolve whether the trial court's comments amounted to a grant of the motion, because its reconsideration of any grant would raise no double jeopardy issue.

(1957). Although "the prohibition against multiple trials is the 'controlling constitutional principle,'" *United States* v. *DiFrancesco*, 449 U.S. 117, 132 (1980) (quoting *United States* v. *Wilson*, 420 U.S. 332, 346 (1975)), there is no flat bar against a retrial when the initial trial ends either in a conviction or in the declaration of a mistrial, see *id.* at 130-133. But the "law attaches particular significance to an acquittal," "whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict." *United States* v. *Scott*, 437 U.S. 82, 91 (1978); see *DiFrancesco*, 449 U.S. at 129-130.

An acquittal—whether the product of a jury verdict or a judicial determination of evidentiary insufficiency—affords absolute protection against a new trial for the offense. See *Scott*, 437 U.S. at 91; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571-576 (1977). The "Constitution conclusively presumes that a second trial would be unfair" following an acquittal, and the "defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Because an acquittal forecloses a second trial, double jeopardy law also precludes any appeal of an acquittal when reversal would require a new trial. See *Scott*, 437 U.S. at 91; *Martin Linen Supply*, 430 U.S. at 570-571. The sole exception to the bar against appeal of an acquittal arises when the court grants a judgment of acquittal after the jury returns a verdict of guilty: there is no prohibition against an appeal by the prosecution in that situation because reversal would entail reinstatement of the jury verdict rather than commencement of a new trial. See *Scott*, 437 U.S. at 91 & n.7; *Martin Linen Supply*, 430 U.S. at 569-570;

United States v. *Wilson*, 420 U.S. at 335-336, 342-345, 352-353.

2. In *Smalis* v. *Pennsylvania*, this Court held that the "Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" 476 U.S. at 146 (quoting *Martin Linen Supply*, 430 U.S. at 570). The trial court in *Smalis* acquitted the defendant on certain counts at the close of the prosecution's case, finding the evidence insufficient to support the charges. 476 U.S. at 141. The trial court then—in an anomalous ruling made possible because the case was tried to the bench rather than a jury—stayed completion of the trial on the remaining charges pending a mid-trial appeal by the prosecution of the court's acquittal order. *Ibid.*; see *Commonwealth* v. *Smalis*, 480 A.2d 1046, 1048 n.1 (Pa. Super. Ct. 1984).[4] The Commonwealth argued that its mid-trial appeal was permissible because reversal of the trial court's acquittal order would lead only to resumption of the initial trial rather than commencement of a new trial. 476 U.S. at 145-146. This Court disagreed, holding that the appeal of an acquittal is barred by double jeopardy whenever reversal would

[4] The Pennsylvania Superior Court concluded that the trial court's decision to allow a mid-trial appeal was "not recommended," explaining that, "[a]fter a criminal trial has been commenced, it should not be delayed by piecemeal appeals from orders which do not terminate the proceedings finally." 480 A.2d at 1048 n.1; cf. *DiBella* v. *United States*, 369 U.S. 121, 126 (1962) ("the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law").

lead "to further trial proceedings," even if not an entirely new trial. *Id.* at 146.

Respondent, like the court of appeals, reads *Smalis* to establish that the grant of a motion for judgment of acquittal is irrevocable and cannot be reconsidered by the trial court consistent with the Double Jeopardy Clause. Br. in Opp. 11-16. Respondent reasons (*id.* at 14) that any reconsideration of such a ruling by the trial court—like the mid-trial appeal in *Smalis*—"would translate into further proceedings of some sort, devoted to the resolution of factual issues" on the charge of first-degree murder. 476 U.S. at 146 (internal quotation marks omitted). That argument overlooks the pivotal distinction between reconsideration of an initial ruling by the trial court itself and reversal of the trial court's ruling on appeal. Although both contemplate "further trial proceedings" on the charge, *ibid.*, a court's reconsideration of its own initial decision to grant a motion for acquittal raises no double jeopardy concerns.[5]

B. The Double Jeopardy Bar Against Appeal Of A Trial Court's Grant Of An Acquittal Does Not Diminish The Court's Authority To Reconsider Its Own Ruling

A "trial court's ruling in favor of the defendant is an acquittal only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, 432 U.S. 23, 30 n.8 (1977) (citation omitted); see *Scott*, 437 U.S. at

[5] In *Smalis*, the trial court had granted the Commonwealth's motion for reconsideration of its ruling, ultimately concluding that the initial ruling was correct. See *Smalis*, 480 A.2d at 1048 n.2. The defendant did not argue—and neither this Court's opinion nor any of the state court opinions suggested—that the trial court was barred by the Double Jeopardy Clause from reconsidering its initial decision.

97; *Martin Linen Supply*, 430 U.S. at 571. The prohibition against "postacquittal factfinding proceedings" recognized in *Smalis*, 476 U.S. at 145, thus comes into play only if the trial court has "actually" reached its "resolution" of "the factual elements of the offense charged," *Lee*, 432 U.S. at 30 n.8. See *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 309 (1984) (emphasizing the need for a "resolution" in order to trigger the double jeopardy bar against further trial proceedings). An appeal necessarily implicates the prohibition against post-acquittal trial proceedings, see *Smalis*, 476 U.S. at 145-146, because, at the time of appellate review, the trial court by definition will have reached its final resolution of the charge. When a trial court reconsiders its own initial decision to grant an acquittal, by contrast, the court by definition has not reached a resolution—the very purpose of the court's reconsideration is to determine what resolution it will reach.

1. *A trial court possesses inherent authority to reconsider a mid-trial ruling granting a motion for acquittal*

a. It has long been settled that trial courts possess an inherent authority to reconsider and correct their interlocutory rulings. See, *e.g.*, *John Simmons Co.* v. *Grier Bros.*, 258 U.S. 82, 88 (1922) ("If it be only interlocutory, the court at any time before final decree may modify or rescind it."). That authority rests on the recognition that the trial context is fluid and frequently requires the court to rule without the benefit of extended deliberation, and that the interests of justice therefore would not be served by precluding a court from correcting its interlocutory decisions. See, *e.g.*, 18B Charles Alan Wright et al., *Federal Practice and*

Procedure § 4478.1 (2d ed. 2002) ("All too often, * * * a trial court could not operate justly if it lacked power to reconsider its own rulings as an action progresses toward judgment. Far too many things can go wrong, particularly with rulings made while the facts are still undeveloped or with decisions made under the pressures of time and docket.").

The basic power of a trial court to reconsider its interlocutory rulings derives from the common law, and exists equally in criminal and civil cases. See, *e.g.*, *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.), cert. denied, 515 U.S. 1151 (1995); *United States* v. *LoRusso*, 695 F.2d 45, 52-53 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983); *United States* v. *Jerry*, 487 F.2d 600, 605 (3d Cir. 1973) ("whether the case * * * be civil or criminal," as "long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so"); see also *United States* v. *Benz*, 282 U.S. 304, 306-307 (1931) (stating common law rule that orders and judgments could be modified by court within the term in which they were entered). As a result, a trial court's "grant of a motion for acquittal" before the completion of trial proceedings "is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify . . . prior to the entry of judgment.'" *Washington*, 48 F.3d at 79 (quoting *LoRusso*, 695 F.2d at 52-53); see *United States* v. *Baggett*, 251 F.3d 1087, 1095 (6th Cir. 2001) (explaining that "an oral grant of a Rule 29 motion outside of the jury's presence does not terminate jeopardy, inasmuch as a court is free to change its mind prior to the entry of judgment"), cert. denied, 534 U.S. 1167 (2002).

Not only does a trial court possess inherent authority to reconsider its interlocutory grant of an acquittal, but a request by the prosecution for the court to reconsider its ruling—or an indication by the court *sua sponte* that it may do so—specifically renders the initial ruling non-final and hence inconclusive. See *United States* v. *Ibarra*, 502 U.S. 1, 6 (1991) (observing that "a motion for rehearing in a criminal case * * * renders an otherwise final decision of a district court not final until it decides the petition for rehearing"); see also *United States* v. *Dieter*, 429 U.S. 6 (1976); *United States* v. *Healy*, 376 U.S. 75 (1964).[6] In that situation, consequently, the trial court's initial decision to grant an acquittal cannot be viewed as its resolution of the charge for purposes of triggering the prohibition against post-acquittal trial proceedings. Instead, the ruling inherently is subject to revision until the entry of final judgment, and a request by the government to reconsider the ruling or a suggestion by the court that the ruling may be reconsidered has the effect of rendering the matter unresolved and the initial ruling non-final. In this case, for instance, the trial judge's oral grant of the motion for an acquittal was rendered non-final when he agreed shortly thereafter to permit further argument on the charge and then specifically ruled the next day that he was reserving his final decision.

b. An appeal presents the opposite situation, in which the trial court's ruling by nature is final. An

[6] This Court's decisions in *Ibarra*, *Dieter*, and *Healy*, establish that a motion for rehearing filed by the government in a federal criminal case has the effect of rendering the court's initial judgment non-final and thus non-appealable, so that the time for taking an appeal begins to run only after the court rules on the motion.

appeal from a trial court's grant of a motion for acquittal— whether an interlocutory appeal, see *Smalis*, 476 U.S. at 145-146, or an appeal from a final judgment following discharge of the jury, see *Martin Linen Supply*, 430 U.S. at 570—presupposes that the trial court has completed its resolution of the charge. A perfected appeal by nature requires that the trial court have reached a definitive and concrete ruling amenable to meaningful appellate review. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978) (explaining that mid-trial order must "conclusively determine the disputed question" to fall within collateral order exception to final judgment rule for appeals, and concluding that order denying class certification does not meet that condition because it is "subject to revision in the District Court").

Moreover, even if the trial court were inclined to reconsider its grant of an acquittal, an appeal generally leaves the court powerless to do so: the "filing of a notice of appeal is an event of jurisdictional significance —it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). Any further proceedings on the charge thus could ensue only from action by the appellate court, not reconsideration by the trial court. Because an appeal presumes that the trial court has reached its definitive resolution, an appeal from a mid-trial ruling granting a judgment of acquittal squarely implicates the double jeopardy bar against post-acquittal fact-finding proceedings. See *Smalis*, 476 U.S. at 145-146.

2. *A trial court's reconsideration of its grant of a motion for acquittal does not infringe double jeopardy principles*

a. This Court's decisions do not suggest that double jeopardy protections diminish a trial court's basic authority to revisit its interlocutory rulings. To the contrary, *Swisher* v. *Brady*, 438 U.S. 204 (1978), supports the conclusion that a court's reconsideration of its mid-trial grant of an acquittal raises no double jeopardy concerns. *Swisher* involved a two-stage system for juvenile court adjudications in Maryland under which a court master, after receiving the evidence, reported his proposed findings, conclusions, recommendations, and orders to the juvenile court. Although the master's proposals were not considered final action until acted on by tne juvenile court, the court could simply adopt (or modify or reject) the master's proposed rulings, the court was limited to the record before the master unless the parties gave consent to supplement the record, and the master served his report on the State and the juvenile who could then file exceptions to the report in the juvenile court. *Id.* at 210-211, 215-216.

A class of juveniles contended that, in cases in which the master concludes that the State has failed to establish guilt beyond a reasonable doubt and reports that conclusion in his proposed findings and orders to the juvenile court, the juvenile court is barred by double jeopardy from considering the State's exceptions to the master's proposed findings. This Court held that a juvenile is not put twice in jeopardy by the court's review of the master's conclusions; instead, he is "subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge." 438 U.S. at 215; see *DiFrancesco*, 449 U.S.

at 140-141 (explaining that *Swisher* involved a "continuing single process").

The trial court's reconsideration in this case of its initial ruling granting an acquittal likewise was part of a "continuing single process." *DiFrancesco*, 449 U.S. at 141. Just as the juvenile court in *Swisher* had authority to adopt, modify, or reject the master's findings and orders recommending an acquittal, a trial court possesses inherent authority to sustain, modify, or withdraw its own initial conclusion that an acquittal is warranted. The State's filing of exceptions to the master's findings in favor of an acquittal is analogous to the prosecution's seeking reconsideration of a trial court's interlocutory grant of an acquittal. Unlike an appeal, which transfers the proceedings to a different court, reconsideration by the trial court merely continues a "single proceeding" before a single tribunal. *Swisher*, 438 U.S. at 215; see *id.* at 217-218 & n.15 (distinguishing *United States* v. *Jenkins*, 420 U.S. 358 (1975), and *Kepner* v. *United States*, 195 U.S. 100 (1904), in part on ground that both decisions involved "appellate review").

b. Reconsideration by the trial court also "does not impinge on the purposes of the Double Jeopardy Clause." *Swisher*, 438 U.S. at 215. This Court has described "the primary purpose of the Double Jeopardy Clause" as "protect[ing] the integrity of a final judgment." *Scott*, 437 U.S. at 92; see *DiFrancesco*, 449 U.S. at 128; *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978). A trial court's mid-trial grant of an acquittal is subject to reconsideration by the court, and therefore does not constitute a "final judgment" on the charge.[7]

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[7] The double jeopardy interest in respecting a final judgment "is akin to that served by the doctrines of *res judicata* and collat-

Moreover, when a court reconsiders its grant of an acquittal at the close of the prosecution's case, it does not afford "the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11 (1978); see *Swisher*, 438 U.S. at 216-217; *Wilson*, 420 U.S. at 352. The prosecution has completed the presentation of its evidence, and it seeks only to continue the trial to a verdict rather than to initiate a new trial at which it can present a more persuasive case. Any further evidentiary proceedings after the trial court's reconsideration can come about only at the initiative of the defendant. See *Swisher*, 438 U.S. at 216 (concluding that the prosecution does not have a "forbidden 'second crack'" before the juvenile court because the "State presents its evidence once before the master," and the "record is then closed, and additional evidence can be received * * * only with the consent of the minor").

Because reconsideration only results in continuation of the trial before the initial finder of fact, moreover, it does not infringe the defendant's "valued right to have [his] trial concluded by a particular tribunal." *Arizona* v. *Washington*, 434 U.S. at 505; see *Swisher*, 438 U.S. at

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eral estoppel." *Crist*, 437 U.S. at 33. An interlocutory ruling generally is not entitled to preclusive effect for purposes of res judicata and collateral estoppel. See Restatement (Second) Judgments § 13 (1982). Instead "the judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court—a 'final' judgment." *Id.* § 13 cmt. a; see *id.* § 13 cmt. b ("when res judicata is in question a judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim * * *) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement").

216. For the same reason, reconsideration does not "enhanc[e] the risk that an innocent defendant may be convicted" as a consequence of undergoing multiple prosecutions before a series of fact-finders. *Swisher*, 438 U.S. at 216 (quoting *Arizona* v. *Washington*, 434 U.S. at 504); see *DiFrancesco*, 449 U.S. at 130; *Green*, 355 U.S. at 188. To the contrary, a court's correction of its erroneous grant of an acquittal "significantly advance[s] the public interest in assuring that each defendant shall be subject to a just judgment on the merits of his case, without 'enhancing the possibility that even though innocent he may be found guilty.'" *Scott*, 437 U.S. at 101 (quoting *Green*, 355 U.S. at 188).

Finally, when a trial court, upon reconsideration, permits the trial to proceed to completion on the reinstated charge, it does not "unfairly subject[] the defendant to the embarrassment, expense, and ordeal of a second trial." *Swisher*, 438 U.S. at 216 (citing *Green*, 355 U.S. at 184); see *Martin Linen Supply*, 430 U.S. at 570 n.7 ("The absence of a threatened second trial * * * substantially reduces the expense and anxiety to be borne by the defendant."). The burdens on the defendant from continuing the trial on the reinstated charge are no different than if the court had initially denied an acquittal or had reserved its ruling. Those burdens are especially immaterial when, as in this case, the court indicates that it may reconsider its initial ruling promptly after announcing it. See *United States* v. *Baker*, 419 F.2d 83, 88 (2d Cir. 1969) (explaining that, although the defendant's "hopes were first raised, then quickly lowered" when the court reconsidered its grant of an acquittal at the close of the prosecution's case, "so ephemeral and insubstantial an injury" raises no double jeopardy violation), cert. denied, 397 U.S. 971 (1970); cf. *Wilson*, 420 U.S. at 345

("Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.").[8]

Whereas a trial court's reconsideration of a mid-trial acquittal thus accords with the core purposes of the Double Jeopardy Clause, barring the court from reconsidering an erroneous acquittal would compromise the important interest recognized in this Court's double jeopardy decisions "in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U.S. at 509; see *id.* at 505 (discussing the "public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury"); see also *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994); *Ohio* v. *Johnson*, 467 U.S. 493, 501 (1984). Precluding the trial court from reconsidering its grant of an acquittal infringes that interest in a manner that the prohibition against an appeal does not: barring reconsideration by the trial court itself would permit a defendant who may

[8] In some cases, the trial court may decide to reconsider its grant of an acquittal only after trial proceedings have resumed or after the jury has been informed that the charge was dismissed. See, *e.g.*, *United States* v. *Blount*, 34 F.3d 865 (9th Cir. 1994). At that point, reinstatement of the charge might unfairly prejudice the defendant's presentation of his case to the jury. That sort of prejudice more squarely implicates the Due Process Clause than the Double Jeopardy Clause. In any event, there is no prejudice when, as in this case, the trial court advises the parties before the trial resumes that it is reserving its final ruling and the jury has no knowledge of the initial ruling or its reconsideration.

be guilty to obtain the benefit of an acquittal even though *no* court believes him entitled to it.

3. *The approach pressed by respondent and applied by the court of appeals is unworkable*

Under the approach adopted by the court of appeals and advocated by respondent, the grant of a motion for acquittal would be irrevocable. The applicability of the Double Jeopardy Clause in this case thus would hinge on whether the trial court's oral statements on March 31, 1992, rose to the level of a grant of respondent's motion for acquittal, at which point the court would have been prohibited from proceeding any further on the charge. That framework not only lacks a grounding in the core purposes of the Double Jeopardy Clause, but it also is unworkable.

When a defendant moves for a judgment of acquittal at the close of the prosecution's case, the trial court, in the interests of avoiding an extended delay before resuming the trial, frequently will rule on the motion orally rather than through a formal order. The determination whether the court in fact granted an acquittal thus would often turn on a parsing of the judge's extemporaneous remarks from the bench. Reviewing courts would be confronted with the task of drawing fine distinctions among myriad factual scenarios based on the exact words used by the trial judge, the precise order in which they were spoken, and the extent to which statements suggesting a decision to grant an acquittal were sufficiently distinct from remarks suggesting equivocation on the matter.[9]

[9] See, *e.g.*, *United States* v. *Baggett*, 251 F.3d at 1091-1092 (trial judge initially stated that "I don't believe that the proof has made out a case of interstate domestic violence," agreed immediately thereafter to "hold [its ruling] in abeyance," but then later stated

That approach is highly indeterminate and defies principled application. As one court has explained, "[m]uch of the determination [would] come[] down to after-the-fact analysis of subtle distinctions preserved in the record of the proceedings. The outcome of something as important as deciding whether a defendant was exposed to double jeopardy should not hang on such guesswork." *State* v. *Collins*, 771 P.2d 350, 353 (Wash. 1989). Distinguishing a situation involving the grant of an acquittal followed promptly by reconsideration from one involving equivocation all along

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that it had "granted the motion" for a judgment of acquittal); *United States* v. *Byrne*, 203 F.3d 671, 674 (9th Cir. 2000) (court first stated that it was "granting the defendant's motion under Rule 29," but then "immediately after that announcement" was asked to reconsider its ruling, which it ultimately agreed to do, observing, "I have made up my mind, unless I can be convinced otherwise"), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Rahman*, 189 F.3d 88, 132-134 (2d Cir. 1999) (court orally grants motion for acquittal, indicates on the next day that it is willing to reconsider the ruling, and on the following day reinstates the charges), cert. denied, 528 U.S. 1094 (2000); *United States* v. *Washington*, 48 F.3d 73, 79 (2d Cir.) (court "orally granted [the] motion for acquittal" on one count at the close of the government's case, resumed the trial on the remaining charge, but then reversed its ruling during an adjournment for lunch after one defense witness had begun testifying), cert. denied, 515 U.S. 1151 (1995); *People* v. *Williams*, 721 N.E.2d 524, 526 (Ill. 1999) (judge states that "I'm going to grant the motion for a directed finding and finding of not guilty," but then says to the prosecutor later in the course of the same colloquy, "if you want to provide me with something, I'll be happy to look at it if you want me to hold that in abeyance but I don't think that it's established"); *State* v. *Collins*, 771 P.2d 350, 351 (Wash. 1989) (court grants acquittal but then, "[m]inutes later," prosecutor offers contrary authority, prompting judge to "reverse[] his first ruling"); *Lowe* v. *State*, 744 P.2d 856, 856-857 (Kan. 1987) (court grants acquittal *sua sponte* but then reverses its ruling the following morning before trial resumes).

would prove especially difficult because "[i]ndividual trial judges' styles of ruling vary. Many judges will think out loud along the way to reaching the final result." *Ibid.*

The facts of this case highlight the shortcomings of respondent's proposed approach. In the trial judge's remarks from the bench on March 31, 1992, he stated, "my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder." Pet. App. 3a. He ended that set of remarks by adding, "I think that Second Degree Murder is an appropriate charge." *Ibid.* Later in the course of his discussions with the parties, the judge said that he would be "glad to hear" further argument from the prosecutor the next morning on whether an acquittal on the charge of first-degree murder was warranted. *Id.* at 29a.

The Michigan Supreme Court, in concluding that the judge's statements did not rise to the level of an oral ruling granting an acquittal, emphasized that his comments were sprinkled with "clearly equivocal" language —*e.g.*, "my impression at this time," "I think"—and also that the judge agreed to hear additional argument the following day. Pet. App. 41a-42a. The court of appeals, by contrast, after examining precisely the same language, found "no ambiguity" in the judge's statements. And although the court of appeals relied in part on the judge's comment the following day that he had "granted the motion," *id.* at 10a-11a, the judge also stated contemporaneously that he had "not directed a verdict," *id.* at 30a, and the very fact that he readily agreed to hear additional argument on the issue may suggest that he had not reached a definitive resolution. In any event, the opposite conclusions drawn by the

two courts demonstrate that the trial judge's treatment of the motion—as will frequently be the case—eludes clear categorization.[10]

For those reasons, it would elevate form over substance to scrutinize the "precise language he used" (Pet. App. 10a) to determine whether the trial judge, at some particular point during the various exchanges, had reached a sufficiently conclusive decision to grant an acquittal that he was barred from considering the issue any longer. This Court "ha[s] disparaged" those sorts of "'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause." *Serfass*, 420 U.S. at 390 (citation omitted). The better approach gives effect to a trial court's inherent authority to reconsider its interlocutory rulings, a rule born of the recognition that the trial context by its nature is highly fluid. That approach is straightforward in its application, it obviates the need to dissect a trial judge's extempo-

[10] The court of appeals found "[a]dditional support" for its conclusion in the docket entry indicating that the judge had reduced the charge of first-degree murder to second-degree murder. Pet. App. 11a-12a. The court of appeals did not assess whether the characterization of actions in the trial docket has legal significance in the Michigan courts, see *People* v. *Kelley*, 449 N.W.2d 109 (Mich. Ct. App. 1989) (explaining that docket entries do not constitute orders for purposes of computing the time for taking an appeal), and the Michigan Supreme Court declined to rehear the case after the docket entry was brought to its attention, see Pet. App. 6a & n.1. If this Court agrees with respondent that a trial court is barred by double jeopardy from reconsidering its grant of an acquittal, the docket entry would support the conclusion that the trial judge had granted respondent an acquittal insofar as courts in Michigan play a substantive role in formulating the language of the docket entries instead of assigning that function to the court clerk as among the clerk's ministerial duties. The record, however, does not illuminate the relative roles of court and clerk.

raneous remarks to pinpoint particular statements beyond which the judge was barred from proceeding, and it is fully consistent with this Court's double jeopardy decisions and with the purposes of the Double Jeopardy Clause.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted.

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FEBRUARY 2003

Supreme Court, U.S.
FILED
FEB 24 2003
CLERK

No. 02-524

IN THE

Supreme Court of the United States

JANETTE PRICE, Warden,

Petitioner,

vs.

DUYONN ANDRE VINCENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is it clearly established by United States Supreme Court precedent that a statement by a trial court indicating an intent to grant a motion for a directed verdict on one count that was followed throughout the trial with actions inconsistent with this intent, constituted an acquittal for the purpose of the Double Jeopardy Clause?

2. Was the Michigan Supreme Court's decision that there was no acquittal because the trial court's statements and actions, when viewed as a whole, were insufficiently explicit to constitute an acquittal a reasonable application of the relevant clearly established double jeopardy precedents of this Court?

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IN THE

Supreme Court of the United States

JANETTE PRICE, Warden,

Petitioner,

vs.

DUYONN ANDRE VINCENT,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case lies at the intersection of one of the most important means of protecting the integrity of state criminal justice systems, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and the most potent weapon in the defendant's

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

criminal procedure arsenal, double jeopardy. The Sixth Circuit merely paid lip service to the deferential standard of 28 U. S. C. § 2254(d), by quoting the provision and then refusing to apply it to the case. Instead of determining whether the Michigan Supreme Court's decision reasonably applied this Court's precedents, the Sixth Circuit made its own determination of whether the trial court violated the Double Jeopardy Clause. This is precisely what Congress intended to prevent when it enacted the AEDPA.

The Sixth Circuit's refusal to follow the AEDPA is compounded by its faulty double jeopardy analysis. It held that an oral indiction of an intent to acquit is an acquittal in spite of the lack of a final judgment or the numerous subsequent actions of the trial court that were inconsistent with granting an acquittal. This would turn double jeopardy into a windfall for lucky defendants. Because a successful double jeopardy defense prevents retrial, it is imperative that the boundaries of what constitutes an acquittal be clearly established, so that double jeopardy remains an important, but limited, constitutional protection rather than a trap for the unwary trial court. The Sixth Circuit's failure to follow the AEDPA and the minefield it would lay for trial courts are contrary to the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Markeis Jones was shot to death during a confrontation between two groups of young people at Hamady High School in Flint, Michigan. *People* v. *Vincent*, 565 N. W. 2d 629, 630 (Mich. 1997). The defendant, Duyonn Vincent, was there with two friends, none of whom attended the school. *Ibid.* There was evidence that the shooting was gang related. See *ibid.* An encounter between the two groups led to arguing, pushing, and shoving. During the encounter, the fatal shots were fired from the back of a Mustang. Testimony indicated that the defendant and a co-defendant, Deamon Perkins, fired the shots. The other

co-defendant, Marcus Hopkins, drove the car away during the shooting. There was evidence that the shots missed their intended victim, while killing Jones, a friend of the defendants. See *ibid.*

The three defendants were charged with murder and felony firearm and were tried at one trial before two separate juries. *Ibid.* At the close of the prosecution's case, all three defendants moved for a direct verdict of acquittal on the first-degree murder charge. See *ibid.* After the defense completed its argument for the motion, the trial court judge made the following statement:

> "Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different then anyone else as I hear the comment made by Mr. Doll [counsel for Perkins] about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement was used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay." *Ibid.*

The jury was not present during this discussion. Before adjournment, the prosecutor asked for time the next day " 'to make a brief restatement in terms of First Degree Murder . . . .' " *Ibid.* The judge stated that he would " 'be glad to hear it . . . [and that he was] always glad to hear [the] people.' " *Ibid.* After hearing the prosecution's argument the next day, the judge decided to reserve his ruling on the motion until he thought more about it. *Id.*, at 630-631. Defense counsel

asserted that double jeopardy prevented reconsideration because the court had already granted an acquittal. See *id.*, at 631. The judge replied that " 'I haven't directed a verdict to anybody .... Oh, I granted a motion but I have not directed a verdict.' " *Ibid.* Vincent was convicted of first-degree murder. See *ibid.*

A Michigan Court of Appeals reversed Vincent's conviction on the first-degree murder count, holding that this murder conviction violated his double jeopardy rights. See *id.*, at 632. The Michigan Supreme Court reversed. After extensively analyzing the statement and the relevant Supreme Court precedent on double jeopardy, it held that the trial judge was simply thinking out loud when he made the statement. The statement should have no "final or binding effect until formally incorporated into the findings, conclusions, or judgment." *Id.*, at 635. Since there was no "clear statement in the record or a signed order in the judgment articulating the reasons for granting or denying the motion" there was no acquittal and therefore no double jeopardy violation. See *id.*, at 636.

Defendant filed a federal habeas petition on January 8, 1998, in the United States District Court for the Eastern District of Michigan. See *Vincent* v. *Jones*, 292 F. 3d 506, 509-510 (CA6 2002). The District Court concluded that the first-degree murder conviction violated the Double Jeopardy Clause of the Fifth Amendment and granted the writ. See *id.*, at 510. The Sixth Circuit affirmed in a brief opinion which stated the deferential standard of 28 U. S. C. § 2254(d)(1) & (2), see *ibid.*, but never applied it to its analysis. See *id.*, at 511-512. Instead, the court simply concluded that the trial court's statement constituted an acquittal with respect to first-degree murder, and that the subsequent first-degree murder conviction violated double jeopardy. See *id.*, at 512. This Court granted certiorari on January 10, 2003.

SUMMARY OF ARGUMENT

The Sixth Circuit did not apply 28 U. S. C. § 2254(d) to this case, but merely paid lip service to the law. Except for reciting the statutory language and a citation to *Williams* v. *Taylor*, 529 U. S. 362 (2000), the decision below makes no use of this provision. Instead it only analyzes whether the trial court's actions violated the Double Jeopardy Clause. The opinion does not examine the detailed double jeopardy analysis of the Michigan Supreme Court's opinion affirming the conviction. This is a total failure to apply the Antiterrorism and Effective Death Penalty Act of 1996, making it necessary to begin the § 2254(d) analysis from scratch.

This case demonstrates that the relevant clearly established rules must be defined at an appropriate level of abstraction for § 2254(d) analysis. This Court has recognized many general principles behind the Double Jeopardy Clause. Applications of *Teague* v. *Lane*, 489 U. S. 288 (1989) and qualified immunity both demonstrate that defining the relevant rule at too high a level of abstraction renders such standards meaningless. If the relevant rule is sufficiently abstract, then any imagined rule can be dictated by it, subverting *Teague*, or an officer's action can always unreasonably violate it, subverting qualified immunity. These problems pose similar threats to § 2254(d)'s deferential standards. The general principles of double jeopardy are too abstract to govern the § 2254(d) analysis.

This Court's double jeopardy cases provide some rules that are sufficiently concrete to govern this case. These rules can be summarized into four points. First, granting an acquittal is the most serious action a trial court can take because acquittals cannot be appealed no matter how erroneous. Second, what constitutes an acquittal for double jeopardy purposes is not decided by the label attached to it, but by determining whether the action resolved some or all of the factual elements of the crime in the defendant's favor. Third, other terminations of the case in the defendant's favor, whether before or after the verdict, are not protected by double jeopardy. Fourth, in order

to invoke double jeopardy, it must be plain that the action terminating the case was an acquittal.

The Michigan Supreme Court applied these principles. It cited Supreme Court precedent for the points that the label attached to the trial court's actions did not determine whether there was an acquittal. It also cited this Court's precedent for the point that an entry of acquittal would bar further proceedings due to the Double Jeopardy Clause. This effectively covers the first three principles. The Michigan Supreme Court also stated the fourth principle, that acquittals must be clear, without citing Supreme Court precedent. Such citation is unnecessary for compliance with § 2254(d)'s "clearly established" prong.

Michigan's high court reasonably applied these principles to this case. It was confronted with a potentially difficult case, due to the tension between the trial court's initial statement and its subsequent actions. While the initial statement indicated an intent to grant an acquittal, every other action of the trial court after the statement argues to the contrary. In this context, the decision to apply the principle that acquittals must be clear in order to terminate jeopardy was not merely reasonable, it was right.

Acquittals must be clear because of the awesome finality accorded to them through the Double Jeopardy Clause. Requiring clear acquittals prevents defendants from receiving unjust windfalls, and allows appellate courts to distinguish between appealable dismissal and unappealable acquittals.

This decision is also consistent with this Court's holdings rejecting labels in acquittal analysis. There are no magic words that transform a trial court's actions into an acquittal. Instead, reviewing courts look to what was done and the reasons given for the actions. Here, the trial court thought out loud about acquitting the defendant on the first-degree murder charge, allowed the prosecution to respond, and then proceeded to act as if it decided not to acquit. This is not an acquittal.

The trial court's actions lacked the necessary finality that double jeopardy requires. While acquittals terminate jeopardy, an action of a court is not an acquittal until it is final. For example, a finding on appeal that there was insufficient evidence to convict bars retrial; it does not bar further appeal. If the initial decision is reversed on appeal or reconsideration, there was no acquittal. Similarly, a trial court's action should not be an acquittal until something resembling a final judgment is entered. Since there is nothing like that in this case, there was no acquittal, making the Michigan Supreme Court's opinion correct.

ARGUMENT

I. The Sixth Circuit did not apply 28 U. S. C. § 2254(d).

It is the duty of courts, both state and federal, "to uphold federal law." See *Stone* v. *Powell*, 428 U. S. 465, 494, n. 3 (1976). Unfortunately, too many federal courts pay too little attention to the habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and this Court's interpretation of that law. Twice this term the Court has summarily reversed in habeas cases for failing to apply the deferential standard for state court decisions required by 28 U. S. C. § 2254(d). See *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) (*per curiam*); *Early* v. *Packer*, 537 U. S. __, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) (*per curiam*). In *Visciotti*, the Ninth Circuit "mischaracterized" the California Supreme Court's decision in the case, and entertained a "readiness to attribute error [that] is inconsistent with the presumption that state courts know and follow the law." See 154 L. Ed. 2d, at 286, 123 S. Ct., at 360. Its application of § 2254(d)'s "unreasonable application" clause "substituted its own judgment for that of the state court, in contravention of 28 U. S. C. § 2254(d)." *Ibid.* *Packer* addressed a similar failure to follow the AEDPA. There the Ninth Circuit faulted the state court for adhering to a state standard that was

even more protective of the defendant's rights than this Court's standard. See 154 L. Ed. 2d, at 270, 123 S. Ct., at 365. The Ninth Circuit also mischaracterized the state court's consideration of defendant's claims and faulted the state court for not following Supreme Court decisions on nonconstituitonal federal law issues, which are not binding on state courts. See *id.*, at 270-271, 123 S. Ct., at 365-366.

The Sixth Circuit's decision in this case is an even more flagrant disregard of Congress's limits on federal habeas corpus. While the Court of Appeals opinions in *Visciotti* and *Packer* at least attempted to apply the AEDPA, the Sixth Circuit merely paid lip service to the law. The only "analysis" of the AEDPA was to quote 28 U. S. C. § 2254(d) at the beginning of its discussion and to then summarize the § 2254(d)(1) standard with a citation to *Williams* v. *Taylor*, 529 U. S. 362 (2000). See *Vincent* v. *Jones*, 292 F. 3d 506, 510 (CA6 2002). Next, after noting and dismissing Michigan's contention that the Michigan Supreme Court's conclusion that there was no directed verdict was a factual determination governed by 28 U. S. C. § 2254(e), see *id.*, at 509, and n. 2, the federal court made no further mention of the AEDPA and completely failed to apply § 2254(d). The very brief opinion simply sets forth its analysis of some of this Court's double jeopardy cases, a short analysis of the trial court's statements, and its conclusion that "[b]y later submitting the case to the jury on the open murder charge, the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause." *Id.*, at 512.

It is as if the AEDPA had not been passed. In addition to ignoring § 2254(d), the Sixth Circuit makes no substantive analysis of decisions interpreting this provision, and does not address the Michigan Supreme Court's decision substantively. The opinion makes only one analytical reference to the decision that should be its focus. After determining that whether the trial court acquitted the defendant of first-degree murder was not a finding of fact, the Court of Appeals concluded that "we

are not bound by the holdings of the Michigan Supreme Court that the trial judge's statements did not constitute a directed verdict under Michigan law." See *id.*, at 511. While that statement is relevant to the § 2254(d)(1) analysis, it does nothing to clarify whether the Michigan Supreme Court's opinion failed either the "contrary to" or "unreasonable application," standards of § 2254(d). Michigan's high court engaged in extensive analysis of the double jeopardy issue. It relied on the double jeopardy precedents of this Court, see Part II, *infra*, and thoroughly analyzed those precedents as applied to this case. See Part III, *infra*. The Court of Appeals' approach does not "ensure that state-court convictions are given effect to the extent possible by law." *Bell* v. *Cone*, 535 U. S. 685, 152 L. Ed. 2d 912, 926, 122 S. Ct. 1843, 1849 (2002). The Sixth Circuit simply ignored the state court's reasoned opinion and decided the issue on its view of the merits.

This term *amicus* CJLF has already provided this Court its views on how to improve the administration of the AEDPA. Some standard for assessing when a state court's decision is reasonable can prevent misapplication of § 2254(d) by the lower courts. A definition that focuses on whether the opinion was plausible is preferable to the tendency of some courts to examine the acceptable level of "error" in the state court opinion. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lockyer* v. *Andrade*, No. 01-1127, at 22-30. Since this Court will probably issue an opinion in *Andrade* before it will decide this case, extensive elaboration of the arguments already made in that case is unnecessary. This case can serve to examine one facet of applying the AEDPA.

The "deceptively plain language" of the Double Jeopardy Clause[2] is surrounded by a subtle and complex body of precedent. See *Crist* v. *Bretz*, 437 U. S. 28, 33 (1978). This often opaque field is an excellent candidate for analyzing how to

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2. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U. S. Const. Amdt. 5.

determine what is the relevant body of "clearly established" Supreme Court precedent, see part II, *infra*, and how to determine whether that law is reasonably applied. See part III, *infra*.

II. The Michigan Supreme Court applied the relevant law that was clearly established by this Court.

A. General Principles.

Because the Sixth Circuit did not apply the AEDPA, it is necessary to start with the first principles of this law. Determining the clearly established law is the threshold question in AEDPA cases. See *Williams* v. *Taylor*, 529 U. S. 362, 390 (2000). What qualifies as an "old rule" under *Teague* v. *Lane*, 489 U. S. 288 (1989) will qualify as "clearly established" under AEDPA so long as the inquiry is limited to this Court's precedents. *Williams*, *supra*, at 412. Determining first what is clearly established limits the scope of the reviewing court's analysis. A court that carefully examines this Court's precedents for clearly established principles may be less likely to grant habeas due to a simple disagreement with the state court over the proper constitutional rule.

The common law development of double jeopardy began sometime in the thirteenth century and by the seventeenth century had evolved "into four common law pleas: autrefois acquit (former acquittal), autrefois convict (former conviction), autrefois attaint (former attainder), and pardon." See Office of Legal Policy, Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals (1987), reprinted in 22 U. Mich. J. L. Ref. 831, 843-844 (1989). The common law pleas were described in some detail by Blackstone. See 4 W. Blackstone, Commentaries 329-332 (1st ed. 1769). The Double Jeopardy Clause "tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*," *United States* v. *Wilson*, 420 U. S. 332, 341-342

(1975), rooting the clause in the common law pleas. See *United States* v. *Scott*, 437 U. S. 82, 87 (1978).

The purpose of the clause is derived from its history.

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States* v. *Green*, 355 U. S. 184, 187-188 (1957); accord *Scott*, 437 U. S., at 87.

The history and purpose of the Clause have only limited use in its modern application. "These historical purposes are necessarily general in nature, and their application has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common law pleas . . . ." *Scott*, 437 U. S., at 87. The problem is that modern criminal procedure is radically different from criminal procedure at the common law or the founding. For example, the present case turns on the meaning of the trial court's response to defendant's motion for a directed verdict at the close of the prosecution's evidence, a procedure that did not exist at either the common law or the founding. Directed verdicts first appeared in criminal cases in this country after the Civil War. See Phillips, The Motion for Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151, 1152, n. 8 (1961); Sauber & Waldman, Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 439 (1994). It was not codified by Congress until the Criminal Appeals Act of March 2, 1907, see Sauber & Waldman, *supra*, at 440. Much of this Court's precedent on acquittals and double jeopardy concerns the prosecution's right to appeal when the case ends in something other than a judgment of guilt. The two double jeopardy cases cited by the Sixth Circuit, *United States* v.

Martin Linen Supply Co., 430 U. S. 564 (1977) and *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986), see *Vincent* v. *Jones*, 292 F. 3d 506, 511 (CA6 2002), both involve this type of appeal. See *Martin Linen*, *supra*, at 566-567; *Smalis*, *supra*, at 141. The Michigan Supreme Court relied on these cases and *Wilson*, *supra*, another government appeal case, see 420 U. S., at 333, in its much more extensive double jeopardy analysis. See *People* v. *Vincent*, 565 N. W. 2d 629, 633-636 (Mich. 1997).[3] The right to appeal is also a relative latecomer to criminal procedure. The defendant had no right to appeal in criminal cases until the late nineteenth century, and the United States did not have a real right to appeal until 1971. See Sauber & Waldman, 44 Am. U. L. Rev., at 440. The lack of government appeals stunted this Court's analysis of acquittals and their effects. See *Scott*, 437 U. S., at 89-90. This aspect of double jeopardy law did not begin to develop until Congress gave the United States full appellate rights in criminal cases in 1971 and the Double Jeopardy Clause was applied to the states in *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969).

There are many general principles that govern this recently developed body of law. The passage from *Green* quoted above is the most noteworthy. A "primary purpose" of the Clause is to "preserve the finality of judgments." *Crist* v. *Bretz*, 437 U. S. 28, 33 (1987); see also *Scott*, 437 U. S., at 92 ("integrity of a final judgment"). "But it has also been said that 'central to the objective of the prohibition against successive trials' is the barrier to 'affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' " *United States* v. *DiFrancesco*, 449 U. S. 117, 128 (1980) (quoting *Burks* v. *United States*, 437 U. S. 1, 11 (1978)). *DiFrancesco*, "[t]he most complete discussion by the Supreme

3. The Michigan Supreme Court also relied on state and intermediate federal appellate decisions. See *ibid.* Since the law must be clearly established from this Court's precedents, see 28 U. S. C. § 2254(d)(1), these cases have only limited bearing on the issue of what law is clearly established.

Court of the policies underlying the double jeopardy clause," 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 25.1(a), p. 630 (2d ed. 1999), summarizes other double jeopardy principles developed by the court. Justice Blackmun's opinion notes that "[a]n acquittal is accorded special weight" so that " '[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair,' " *DiFrancesco*, 449 U. S., at 129 (quoting *Arizona* v. *Washington*, 434 U. S. 497, 503 (1978)), but that the government can proceed again "where the trial has not ended in an acquittal." See *id.*, at 130. Finally, the government may retry defendants who successfully appeal unless the reversal was based on an insufficiency of the evidence. See *id.*, at 131.

Although clearly established, these principles do not define the relevant body of law for the § 2254(d) inquiry. The statements are too abstract to govern the question presented by this case—what constitutes an acquittal with respect to double jeopardy. Accepting abstract principles like these as the relevant body of precedent would compromise the deferential standard of § 2254(d).

This Court has addressed the issue of abstraction and reasonableness in closely related contexts. The most instructive example is found in the application of *Teague* v. *Lane*, 489 U. S. 288 (1989). *Sawyer* v. *Smith*, 497 U. S. 227 (1990) held that analyzing the *Teague* issue at too high a level of abstraction would destroy the rule. The case addressed whether *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) was a new rule under *Teague*. See *Sawyer*, *supra*, at 229. *Caldwell* had held "that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." *Id.*, at 233. The petitioner in *Sawyer* asserted that *Caldwell* was dictated "by the principal of reliability in capital sentencing." See *id.*, at 236. Although reliability in sentencing was a thoroughly established

principle at the time his conviction was final, see *id.*, at 235, it could not govern the *Teague* analysis. "But the test would be meaningless if applied at this level of generality." *Id.*, at 236. Any rule that does not contradict one of this Court's decisions can be justified by some sufficiently general legal principle.

Sawyer took its cue from the qualified immunity case of *Anderson* v. *Creighton*, 483 U. S. 635 (1987). See 497 U. S., at 236. Qualified immunity protects government officials performing discretionary functions by "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, *supra*, at 638. This is a test of "objective legal reasonableness" which is examined under the law that was "clearly established" at the time of the allegedly unlawful action. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818-819 (1982). *Anderson* involved a warrantless search of a house conducted by Officer Anderson and other officers because they thought a suspected bank robber might be there. 483 U. S., at 637. The Court of Appeals' analysis "consisted of little more than an assertion that a general right Anderson was alleged to have violated—the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances—was clearly established." *Id.*, at 640. It did not address "the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances." *Id.*, at 640-641 (emphasis in original). Allowing this level of generality to establish the standard of legal reasonableness would destroy the test. "For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said about any other constitutional or statutory violation." *Id.*, at 639. The circuit court's refusal to examine the more specific applications of the Fourth Amendment "was erroneous." *Id.*, at 641.

This analysis also governs § 2254(d). *Teague*'s new rule analysis is already closely connected to the AEDPA's clearly established inquiry. See *Williams*, 529 U. S., at 412. *Teague*, qualified immunity, and the AEDPA each protect reasonable government actions from federal judicial review. See *Sawyer*, 497 U. S., at 234; *Anderson*, 483 U. S., at 639; 28 U. S. C. § 2254(d)(1). Setting the clearly established law at too high a level of generality would subvert the AEDPA as readily as it would *Teague* and qualified immunity. The principles previously surveyed, see *supra*, at 10-13, are too general to govern this case. Instead, it is necessary to determine what is clearly established about the meaning of acquittal in the context of the facts of this case.

B. The Concrete Rules.

The question of what constitutes an acquittal has not been addressed often by this Court. The first modern case addressing acquittals is *Green* v. *United States*, 355 U. S. 184 (1957), in which the jury was instructed on both first- and second-degree murder, and convicted Green of the lesser offense. After the conviction was overturned, he was retried and convicted of first-degree murder. See *id.*, at 186. *Green* held that the first verdict was an implicit acquittal of the greater charge, and double jeopardy prevented retrial on the first-degree murder count. See *id.*, at 190-191. This holding does not shed any light on the present case. *Green* posed a relatively simple problem of interpreting a jury's verdict. It is difficult to argue with the logic that silence on the greater offense is an acquittal when the jury convicts on the lesser offense. The present case does not involve a silent verdict, but rather the meaning of the trial court's words and actions. *Green*'s real significance is its holding that a successful appeal by the defendant does not waive double jeopardy. See *id.*, at 191-192.

Acquittal decisions typically come in the context of government appeals. The next decision after *Green*, *Fong Foo* v. *United States*, 369 U. S. 141 (1962) (*per curiam*), sets the

pattern. The District Court, relying on alleged prosecutorial misconduct, directed the jury to return a verdict for the defendant. See *id.*, at 142. The Court of Appeals set aside the acquittal, holding that the District Court lacked the power to acquit on this ground. See *ibid.* This Court reversed, holding that an acquittal, even if "based upon an egregiously erroneous foundation" was final and could not be appealed. *Id.*, at 143. Although it does not dwell on what constitutes an acquittal, *Fong Foo* highlights the importance of that decision. An injustice was perpetrated on the people by the District Court in *Fong Foo*, one that could not be corrected because of the absolute finality of acquittals.

The first significant discussion of what was an acquittal, rather than the acquittal's effect, is found in *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977). *Martin Linen* addressed whether an acquittal granted by a trial court after a hung jury was appealable. See *id.*, at 566-567. The double jeopardy analysis focused on the need to protect defendants from the threat of a second trial. See *id.*, at 569. Because a successful appeal would require a second trial, it was necessary to "inquire further into the constitutional significance of a [Federal Rules of Criminal Procedure] Rule 29(c) acquittal." *Id.*, at 571. This Court then established the standard for assessing whether a judge's action is treated as an acquittal for double jeopardy purposes. What constitutes an

> " 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, *whatever its label*, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.*, at 571 (emphasis added; citations and footnote omitted).

Martin Linen did not require any heavy analytical lifting once this point was made. There was no question that the Rule 29(c) grant satisfied this test. The District Court proclaimed that this was "the weakest [contempt case that] I've ever seen." *Id.*, at 572 (internal quotation marks omitted). When it entered

the judgments of acquittal, the court wrote that "the government has failed to prove the material allegations beyond a reasonable doubt . . . ." *Ibid.* (internal quotation marks omitted). Because the District Court had "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction," see *ibid.*, there was an acquittal protected by double jeopardy. See *id.*, at 575.

The *Martin Linen* test has two components. The first is a warning against allowing labels to mislead the analysis. This is an old and uncontroversial point. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934) ("tyranny of labels"). This is not a grant of power to a reviewing court to superimpose its ideas on that of the trial court. The trial court's statements and the effects of its actions are relevant to the inquiry, as demonstrated by *Martin Linen*'s reliance on the District Court's statement of its reasons for granting the acquittal.

The second part of the test limits the inquiry to the factual elements of the offense. Legal rulings terminating the case in the defendant's favor do not come under *Martin Linen*'s definition of acquittal. In *United States* v. *Wilson*, 420 U. S. 332 (1975), this Court allowed the government to appeal a dismissal of the indictment rendered after a guilty verdict. See *id.*, at 333. The defendant had no right to benefit from an error of law where it could be corrected without resorting to another trial. *Id.*, at 345. *Martin Linen* applies *Wilson*'s distinction to the definition of acquittal.

This distinction was given greater importance in *United States* v. *Scott*, 437 U. S. 82 (1978), which allowed the government to appeal dismissals rendered before the verdict. See *id.*, at 84. Double jeopardy did not bar the government's appeal even though success would require retrial. In this context, double jeopardy only protected acquittals, which were limited to *Martin Linen*'s definition, see *id.*, at 97, effectively extending *Wilson* to midtrial dismissals. *Scott* expounded on what constituted an acquittal, noting that acquittals could be based on the prosecution's failure to rebut affirmative defenses, or

derived from " 'erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . .' " *Id.*, at 98 (quoting *id.*, at 106, Brennan, J., dissenting). However, an acquittal still must involve a rejection of at least some of the material facts of the crime.[4]

Scott makes this distinction relevant to the present case, which deals with the trial court's actions before the verdict. It also affirms another important, clearly established concept that limits the definition of acquittal. "Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will only be barred when 'it is *plain* that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.' " *Id.*, at 97 (quoting *Martin Linen*, 430 U. S., at 572) (emphasis added). This limitation naturally flows from the consequences of an acquittal and the nature of the inquiry.

Double jeopardy is unique in constitutional law. See *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 302 (1984). No matter how erroneous or unjust, the prosecu-

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4. The *Scott* Court also stated the double jeopardy "may" attach when "the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence." *Id.*, at 92. This is dicta, *Sattazahn* v. *Pennsylvania*, 537 U. S. __ (No. 01-7574, Jan. 14, 2003) (slip op., at 12), and cannot be a clearly established rule for the § 2254(d) inquiry. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (" 'clearly established Federal law' . . . refers to the holdings, as opposed to the dicta").

Sattazahn is one of this Court's cases applying double jeopardy to capital sentencing proceedings that "have the hallmarks of the trial on guilt or innocence." See *Bullington* v. *Missouri*, 451 U. S. 430, 439 (1981). In such proceedings, decisions not to impose the death penalty are deemed acquittals that bar the imposition of that sentence in any future proceedings. *Ibid.* This unique departure from double jeopardy as applied to sentencing, see, *e.g.*, *Stroud* v. *United States*, 251 U. S. 15 (1919), has little relevance to the acquittals on guilt addressed in this case.

tion cannot overcome the decision of a trial court to take the case away from the jury and order an acquittal. While Ernesto Miranda was reconvicted of rape after this Court reversed his conviction, see L. Baker, Miranda: Crime, Law and Politics 191-193 (1983), Fong Foo walked away a free man even though the United States never had a real chance to prove its case against him. Given the extreme consequences of an acquittal, it only makes sense to require that the trial court's actions clearly satisfy the *Martin Linen* test before being cloaked in double jeopardy's invincible armor.

This requirement also alleviates the strongest criticism of *Scott*'s fact/law distinction, that this standard will be too difficult to apply in a principled manner. See *Scott*, 437 U. S., at 110-111 (Brennan, J., dissenting); 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3919.5, p. 655 (2d ed. 1991). The *Scott* majority foresaw no problem in making this distinction, see 437 U. S., at 99, n. 12, and this prediction has proven accurate. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 25.3(a), p. 666 (2d ed. 1999). The plain statement requirement assures this result. If the trial court does not clearly state the reasons for the termination of the action, determining whether the termination was a dismissal or an acquittal will be much more difficult for an appellate court. See Wright, Miller, & Cooper, *supra*, § 3919.5, at 683-684.

The remaining significant acquittal cases reaffirm these principles. *Sanabria* v. *United States*, 437 U. S. 54 (1978), decided on the same day as *Scott*, held that an acquittal based upon an erroneous evidentiary ruling could not be appealed. See *id.*, at 77-78. In *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986), the trial court dismissed certain charges on the ground that the evidence was legally insufficient to support a conviction. *Id.*, at 141. The fact that this was labeled a demurrer rather than an acquittal was irrelevant. The finding that the evidence could not support a conviction was an acquittal for the purpose of invoking double jeopardy. See *id.*, at 144.

The relevant clearly established law governing this case is that: 1) while acquittals terminate the prosecution, not all terminations favoring the defendants are acquittals; 2) what is an acquittal is not decided by the label attached to it, but by determining whether the action resolved, in the defendant's favor, some or all of the factual elements of the crime; 3) other terminations of the case, whether before or after the verdict, are not protected by double jeopardy; 4) in order to invoke double jeopardy it must be plain that the action terminating the case was an acquittal. The next question is whether the Michigan Supreme Court "correctly identifie[d] the governing legal rule." *Williams*, 529 U. S., at 407.

C. The "Contrary To" Clause.

The Michigan Supreme Court identified the correct double jeopardy principles established by this Court's precedents. A state court decision does not violate the "contrary to" clause of § 2254(d)(1) unless "the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell* v. *Cone*, 535 U. S. 685, 152 L. Ed. 2d 912, 926, 122 S. Ct. 1843, 1850 (2002). Since this Court has not addressed a set of facts materially indistinguishable from this case, the only question is whether the Michigan Supreme Court applied the correct rules.

Michigan's high court relied on three United States Supreme Court opinions in its decision. It cited *Martin Linen*, *supra*, and *Wilson*, *supra*, for the proposition that the trial court's label and characterization of its actions did not determine whether they constituted an acquittal. See *People* v. *Vincent*, 565 N. W. 2d 629, 632-633 (Mich. 1997). Instead, "what we must determine is 'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' " *Id.*, at 633 (quoting *Martin Linen*, 430 U. S., at 571). The decision also cited *Smalis*, *supra*, for the principle

when the trial court enters an acquittal, further proceedings are barred by the Double Jeopardy Clause. See *ibid.* (citing *Smalis*, 476 U. S., at 142). These are the first three clearly established principles governing the double jeopardy issue in this case. See *supra*, at 20.

The Michigan Supreme Court also applied the remaining clearly established rule, that the acquittal must be plain. See *supra*, at 20. It held that there must be a "clear statement" or a "signed order of judgment" articulating why the motion was granted so that it was "evident that there has been a final resolution of some or all of the factual elements of the offense charged." *Vincent*, 565 N. W. 2d, at 636. The opinion may not have cited *Martin Linen* or *Scott*, or used the same language, but the effect is the same—requiring the acquittal to be plain or evident before invoking double jeopardy. A state court does not have to cite this Court's precedent to avoid violating the "contrary to" standard. So long as the correct principles are applied, their justification is not a concern. See *Early* v. *Packer*, 537 U. S. __, 154 L. Ed. 2d 263, 269-270, 123 S. Ct. 362, 365 (2002). Requiring the order to unambiguously resolve factual elements of the crime in defendant's favor before being classified as an acquittal simply follows the law set forth by this Court.

The Michigan Supreme Court's decision is not "contrary to . . . clearly established Federal law . . . ." If habeas can be granted in this case, it will be granted only if that court applied the correct principles unreasonably to the facts of this case. As we will show in the next part, the state court's decision here was not merely reasonable, it was right.

III. The Michigan Supreme Court reasonably applied the relevant clearly established law.

Once the relevant clearly established law is ascertained, the reasonable application standard should be comparatively simple to apply. The AEDPA does not ask if the federal court agrees

that the state court was correct, but only if the state court made a reasonable application of the clearly established law. *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 287-288, 123 S. Ct. 357, 361 (2002) (*per curiam*). Reaching the "wrong" result is not the same as an unreasonable application. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). If the state court has identified and applied the clearly established law, then its interpretation of these precedents is likely to be reasonable.

This Court has not provided any detailed test to determine whether a state court's decision is reasonable. Instead, it has simply concluded after examining the relevant law that the state court decision was either reasonable, see, *e.g.*, *Visciotti*, *supra*; *Bell* v. *Cone*, 535 U. S. 685, 152 L. Ed. 2d 912, 931-932, 122 S. Ct. 1843, 1854 (2002); *Penry* v. *Johnson*, 532 U. S. 782, 795 (2001) (Fifth Amendment claim), or unreasonable. See *Penry*, *supra*, at 803-804 (Eighth Amendment claim); *Williams*, 529 U. S., at 397. Some circuit courts try to flesh out the § 2254(d) standard. The Seventh Circuit has stated, "The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes . . . . Some decisions will be at such tension with governing U. S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue." *Hall* v. *Washington*, 106 F. 3d 742, 748-749 (CA7 1997). Adopting a standard like this would be helpful in guiding the federal courts' application of § 2254(d). See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lockyer* v. *Andrade*, No. 01-1127, at 22-26.

The Michigan Supreme Court's decision satisfies any test of reasonableness. This case was not simple. The trial court's conduct was less than exemplary. It acted equivocally about the single most important motion it had to rule on. Furthermore, the decision to delay ruling on the directed verdict motion violated Michigan law. See *People* v. *Vincent*, 565 N. W. 2d 629, 631, n. 1 (Mich. 1997). Granting the double

jeopardy claim would erase the jury's verdict and deprive the state of a retrial.

The greatest problem is posed by the tension between the trial court's words and actions on the day the directed verdict motion was made. Had it done nothing else that day, the statement made after the motion, see *supra*, at 3, would indicate that the trial court would dismiss the first-degree murder charge. See *id.*, at 631 (quoting analysis of the Michigan Court of Appeals). The trial court's actions immediately after the statement eliminate this possibility. Allowing the prosecution to make its case the next day is inconsistent with an intent to immediately acquit the defendant. The trial court's statement came at the end of the defendant's argument supporting the directed verdict motion. See *id.*, at 630. The prosecution had not yet responded, and the trial court gave the prosecution this opportunity after indicating an initial agreement with the defendants' position. In this context, the Michigan Supreme Court's conclusion that the trial court was simply thinking out loud, see *id.*, at 634, was correct.

None of this Court's double jeopardy cases have addressed a similar set of facts. In each of the cases a motion had been clearly granted and the jury dismissed. See part I-B, *supra*. The question was the effect of the granted motion rather than whether a motion had been granted. Presented with this set of facts, the Michigan Supreme Court performed admirably.

The rule that a court's labeling of a motion does not control the double jeopardy analysis, see *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977), does not change the result. Rejecting labels means that there are no magic words that automatically transform a trial court's actions into an acquittal that terminates jeopardy, or a dismissal that contemplates a government appeal and possible retrial. "The word [acquittal] itself has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U. S. 377, 392 (1975). Instead, reviewing courts must look to what was done and the reasons given for the trial court's actions. In

Martin Linen, there was an acquittal in both form by the clear grant of a Federal Rule of Criminal Procedure 29(c) motion to acquit and dismiss the jury, see 430 U. S., at 566, and in substance, by the District Court's reasons for granting the motion. See *id.*, at 572. In this case, while the trial court's initial motion indicated acceptance of the defendant's position, every other action it took in the trial was to the contrary. It allowed the prosecution to rebut the defendants' claims the next day, see *Vincent*, 565 N. W. 2d, at 630, it decided to reserve its ruling on the motion after hearing the prosecution's rebuttal, see *id.*, at 630-631, it stated that it had not directed a verdict, see *id.*, at 631, it never applied the legal standard for directing a verdict in its initial statement, see *id.*, at 634, it never entered a final order of acquittal, see *id.*, at 633, and it allowed Vincent to be convicted of first-degree murder. See *id.*, at 631.

The crux of the Michigan Supreme Court's analysis is that the trial court's actions were not explicit enough to acquit the defendant of the first-degree murder count. "When ruling on the sufficiency of the evidence, a court must generally give a more particularized detailed analysis on the record of the evidence and reasoning that forms the basis of the decision and a clear statement that the motion is either granted or denied." *Id.*, at 634. This follows from the fourth clearly established principle, that the acquittal must be plainly evident before double jeopardy bars further action. See *supra*, at 20. Requiring clarity helps to limit the injustices caused by the irrevocable nature of acquittals. If equivocal or ambiguous statements are to be treated as acquittals, then the Double Jeopardy Clause becomes a trap rather than a right. "But neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls." *Jones* v. *Thomas*, 491 U. S. 376, 387 (1989). If double jeopardy is to be administered as an ancient right rather than as a technicality, see *ibid.*, then its drastic sanction should be reserved for actions that are clearly acquittals.

With the language "[w]e hold that in order to qualify as a directed verdict of an acquittal . . . ," see *Vincent*, 565 N. W. 2d, at 636, the Michigan Supreme Court also recognized state rules governing directed verdicts. This does not conflict with the principle that even erroneous acquittals are protected by double jeopardy. See *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) (*per curiam*). The Michigan Supreme Court did not merely hold that the trial court's action was procedurally erroneous. The equivocal nature of the trial court's acts made it impossible to find a resolution of some or all of the material elements of the crime in the defendant's favor, see *Vincent*, *supra*, at 636, removing the case from the Double Jeopardy Clause.

The trial court's statements lacked the finality that double jeopardy requires. An "acquittal 'represents *a resolution*, correct or not, of some or all of the factual elements of the offense charged.' " *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 309 (1984) (quoting *Martin Linen*, 430 U. S., at 571) (emphasis added in *Lydon*). There was no final judgment of acquittal in this case. The Michigan Supreme Court's conclusion that the "judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment," *Vincent*, 565 N. W. 2d, at 635, is a common sense interpretation of double jeopardy. A prime purpose of double jeopardy is "to protect the integrity of final judgments." See *United States* v. *Scott*, 437 U. S. 82, 92 (1978). In *United States* v. *Ball*, 163 U. S. 662 (1896), this Court held that double jeopardy did not prevent retrial after the conviction was reversed on appeal. See *id.*, at 671-672. This decision "effectively formulated a concept of continuing jeopardy that has application where criminal proceedings have not run their full course." *Price* v. *Georgia*, 398 U. S. 323, 326 (1970). Acquittals terminate jeopardy "whether they are 'express or implied by a conviction on a lesser included offense.' " *Lydon*, 466 U. S., at 308 (quoting *Price*, *supra*, at 329).

When a jury returns a verdict of acquittal the proceeding is ended, even if a final judgment cannot be entered because of a defective indictment. See *Ball*, 163 U. S., at 669, 671. Judicial pronouncements are different. In *Burks* v. *United States*, 437 U. S. 1 (1978), a finding by an appellate court that the evidence was legally insufficient to convict barred retrial on double jeopardy grounds. See *id.*, at 18. However, this is only true if the appellate court's ruling is left undisturbed by a higher court. See *Lydon*, 466 U. S., at 308-309. If the appellate case is capable of being reversed by a motion for reconsideration, or rehearing en banc, or by certiorari to this Court, then there is no final judgment, and jeopardy has not ended.

Similarly, a trial court's actions do not become an acquittal that terminates jeopardy until a final judgment is ente ed. Since there is nothing resembling that in this case, there was no acquittal.

The rules promulgated by the Michigan Supreme Court will help prevent cases like this from arising again. This is not an attempt to crush the defendant through repeated retrials, but rather an attempt to prevent him from reaping an undeserved windfall. The rules are consistent with the intent and spirit of the Double Jeopardy Clause, along with this Court's more specific applications of this provision. The Michigan Supreme Court's decision is a good faith effort to solve a problem not directly addressed by Supreme Court precedent and is both plausible and reasonable. It is the type of decision that Congress meant to protect when it enacted the AEDPA. Had the Sixth Circuit applied the AEDPA, it would not have upheld the grant of habeas corpus.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

February, 2003

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 24 2003

No. 02-524

In the Supreme Court of the United States

JANETTE PRICE, WARDEN,
Petitioner,

v.

DUYONN ANDRE VINCENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* STATES OF TEXAS, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, LOUISIANA, MARYLAND, MASSACHUSETTS, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI CURIAE* INTEREST

Texas, and the 21 other states that join in this brief, urge the Court to reverse the decision of the Sixth Circuit in *Vincent v. Jones*, 292 F.3d 506 (CA6 1998), *cert. granted*, 123 S.Ct. 816 (2003) (No. 02-524). This case presents an important question affecting the States' interest in the correct standard of review to be applied in federal habeas proceedings. At issue is whether a federal court reviewing a writ of habeas corpus can bypass the statutory scheme established by Congress in the Antiterrorism and Effective Death Penalty Act (AEDPA) and review issues—that were adjudicated by the state court—under a pre-AEDPA standard of review, *i.e.*, *de novo*.

In enacting the AEDPA, Congress limited a federal court's power to grant habeas relief based on a claim already adjudicated by the state courts. Generally, because of exhaustion and procedural default principles, a federal court will review a habeas petitioner's constitutional claims only after those claims have been adjudicated by a state court. And, the AEDPA mandates increased deference by federal courts to the factual findings and legal determinations of the state courts.

The Sixth Circuit's *de novo* review of Vincent's double jeopardy claim significantly weakens the AEDPA standard of review, undermines the States' legitimate interests in having the first opportunity to right their mistakes, and thus offends state sovereignty. *Amici* States' interests are served by the Court's resolution of the question presented regarding the Sixth Circuit's failure to apply the highly deferential standard of review in 28 U.S.C. §§2254(d) and (e).

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Amici file this brief because the States have a strong interest in ensuring that their state court decisions are accorded proper deference by federal courts. The Sixth Circuit's decision makes the States subject to a review of federal habeas petitions without proper deference to state courts' adjudication of constitutional claims. While *Amici* support Petitioner's request that the Court reverse the Sixth Circuit's decision based on the legal merits of the issues presented, *Amici*'s brief focuses on the AEDPA standard of review as it relates to questions 1 and 2 of the questions presented in this case.

SUMMARY OF THE ARGUMENT

With the passage of the AEDPA, Congress redefined the scope of a federal court's review of a state criminal conviction. Specifically, under the standard of review set forth in 28 U.S.C. §2254(d), a federal court is barred from granting habeas relief without affording substantial deference to the state court's adjudication of the claims.

Under the AEDPA, factual determinations by the state court must be presumed correct, absent clear and convincing evidence to the contrary, and legal decisions must be upheld unless they are either "contrary to" "clearly established Federal law, as determined by the Supreme Court of the United States" or "an unreasonable application of" that clearly established law.

Inexplicably, the Sixth Circuit's *de novo* review of the Michigan Supreme Court's decision ignored the standard of review set forth in the AEDPA. Because it deemed the critical question to be legal in character, the Sixth Circuit believed it could simply set aside the Michigan Supreme Court's conclusion and resolve the matter *de novo*. But, under the AEDPA, when a state court both identifies the governing rule of law and reasonably applies that rule, a federal habeas court cannot disregard that decision and come to its own independent conclusion. If the state court's decision

complies with the terms of the AEDPA—that is, the decision is not an objectively unreasonable application of clearly established federal law—then the federal court may not gainsay the state court's judgment.

The Michigan Supreme Court properly identified the controlling rule of law, reasonably applied it to the facts of this case, and decided that Vincent's double jeopardy rights had not been violated. The Sixth Circuit neither applied the proper standard of review to the Michigan Supreme Court's decision nor explained its reason for failing to do so.

Acceptance of the Sixth Circuit's failure to apply the AEDPA standards of review would subvert the important interests of finality, comity, and federalism underlying Congress's intent in enacting the AEDPA. Federalism concerns demand that a federal court apply the proper standard of review when considering a claim that was adjudicated on the merits and rejected by a state's highest court. Because the Sixth Circuit's decision is contrary to the AEDPA and to the principles of federalism, it should be reversed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE AEDPA AND PRINCIPLES OF FEDERALISM DICTATE THAT A FEDERAL COURT SHOULD RESPECT A STATE COURT'S ADJUDICATION OF A CONSTITUTIONAL CLAIM.

The AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus." *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J.). Section 2254(d) precludes federal courts from granting habeas relief as to any claim that was adjudicated on the merits in a state court proceeding unless such adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

> Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §§2254(d)(1), (2).

Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. §2254(e)(1). Thus, for both legal and factual determinations, the AEDPA demands increased federal deference to state court decisions.

On April 18, 2000, this Court issued its decision in *Williams v. Taylor* in which the Court construed the AEDPA's standard of review as set forth in amended §2254(d)(1). Justice O'Connor delivered the opinion of the Court with respect to the proper interpretation of the new standard of review. *Williams*, 529 U.S., at 402-13.

Construing §2254(d)(1), the Court determined that a state court decision can be "contrary to" clearly established federal law only if the state court: (1) applies a rule that contradicts governing Supreme Court precedent, or (2) confronts a set of facts materially indistinguishable from a decision of the Court but nevertheless arrives at a different result. *Id.*, at 405-06.

Under the "unreasonable application" clause, a federal habeas court should inquire "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.*, at 409. The Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly

established federal law was also objectively unreasonable. *Id.*, at 411.

In this case, the Sixth Circuit improperly ignored the standards of review under 28 U.S.C. §§2254(d)(1)-(2), (e)(1), and accorded no deference to the Michigan Supreme Court's decision rejecting Vincent's double jeopardy claim. Rather than apply the correct AEPDA standard, the Sixth Circuit considered Vincent's claim *de novo* and affirmed the district court's grant of the writ.

Federalism concerns—and the express terms of the AEDPA—demand that a federal court accord proper deference to a state court's decision, particularly when the state court relied on controlling Supreme Court precedent in dismissing the same claim. *See infra* Part II. Failing to accord deference to a state court's decision, and proceeding with a *de novo* review, shows a disregard for state judicial procedures. It also undermines the fundamental principle that states are coequal sovereigns fully capable of abiding by their constitutional duty to protect and enforce federal constitutional rights. *See* U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several states, shall be bound by oath or Affirmation, to support this Constitution."). The Sixth Circuit's opinion completely disregards the standards of deference and review set forth in the AEDPA.

II. THE SIXTH CIRCUIT FAILED TO APPLY THE AEDPA'S STANDARD OF REVIEW AS INTERPRETED BY THE COURT IN *WILLIAMS V. TAYLOR*.

The Sixth Circuit noted but did not apply the AEDPA standard of review. In a section titled "Standard of Review," the court of appeals stated that "[a] district court's legal conclusions in a habeas proceeding are reviewed *de novo* and its factual findings are reviewed for clear error." *Jones*, 292 F.3d, at 510 (citing *House v. Bell*, 283 F.3d 737 (CA6 2002)). Then, immediately following this statement, the court set forth, verbatim, the language of

§2254(d)—the AEDPA standard of review. *Id.* (quoting 28 U.S.C. §2254(d); *Williams v. Taylor*, *supra*). Notwithstanding its recitation of the AEDPA standard of review, the Sixth Circuit's opinion is devoid of any analysis actually applying this standard to the Michigan Supreme Court's decision.

Under §2254(d)(1), a state court decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in" this Court's decisions. *Williams*, 529 U.S., at 405. In this case, the Michigan Supreme Court's decision would be "contrary to" this Court's clearly established precedent if it had held, for example, that a directed verdict was not an acquittal that invoked double jeopardy protections—but that is not what the Michigan Supreme Court held. *See People v. Vincent*, 565 N.W.2d 629, 633 (Mich. 1997) (citing *Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986)); *see also, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). The Michigan Supreme Court explicitly cited this Court's controlling jurisprudence and stated that "if a directed verdict were rendered, further proceedings would violate [Vincent's] double jeopardy rights." *Vincent*, 565 N.W.2d, at 633.

Moreover, the Michigan Supreme Court aptly noted "[u]ltimately what we must determine is 'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Id.* (citing *Martin Linen*, 430 U.S., at 571). Accordingly, after reviewing the facts of the case under these standards, the Michigan Supreme Court held that the statements of the trial judge regarding the motions for directed verdicts "did not represent an actual resolution of some or all of the factual elements of the offense charged. Therefore, further proceedings were not barred by the Double Jeopardy Clause, and [Vincent's] rights were not violated." *Id.*, at 633.

Since the Court issued its decision in *Williams*, the courts of appeals have routinely applied the AEDPA standard of review in federal habeas proceedings. *See Cox v. Miller*, 296 F.3d 89, 101 (CA2 2002), *petition for cert. filed*, 71 U.S.L.W. 3430 (U.S. Dec. 11, 2002) (No.02-937); *Greene v. Lambert*, 288 F.3d 1081, 1088 (CA9 2002); *Revilla v. Gibson*, 283 F.3d 1203, 1209-10 (CA10), *cert. denied*, 123 S.Ct. 541 (2002); *Valdez v. Cockrell*, 274 F.3d 941, 946-47 (CA5 2001), *cert. denied*, 123 S.Ct. 106 (2002); *Fortini v. Murphy*, 257 F.3d 39, 47 (CA1 2001), *cert. denied*, 535 U.S. 1018 (2002); *Romine v. Head*, 253 F.3d 1349, 1364 (CA11 2001), *cert. denied*, 535 U.S. 1011 (2002); *Bell v. Jarvis*, 236 F.3d 149, 162 (CA4 2000); *Hameen v. Delaware*, 212 F.3d 226, 235 (CA3 2000), *cert. denied*, 532 U.S. 924 (2001). By contrast, in this case, the Sixth Circuit did not review the Michigan Supreme Court's decision to determine whether it was "contrary to" or involved an "unreasonable application of, clearly established Federal law," as determined by this Court.

Instead, the Sixth Circuit expressly stated that, because the question whether a directed verdict was granted was a legal and not a factual question, in its judgment, it was "not bound by the holding of the Michigan Supreme Court that the trial judge's statements did not constitute a directed verdict under Michigan law." *Jones*, 292 F.3d, at 511.

In truth, although "the proper characterization of a question as one of fact or law is sometimes slippery," *Thompson v. Keohane*, 516 U.S. 99, 110-11 (1995), the question of whether the trial judge actually granted a directed verdict is best framed as a mixed question of fact and law. Disaggregated, the question entails an inquiry into what in fact transpired in the trial court, and what, in turn, was the legal significance of those events—procedurally, under Michigan law, and substantively, whether the court's action represented a resolution of the factual elements of the first-degree murder charge.

The Sixth Circuit conflated this inquiry into one determination, which it described as "the legal significance of [the trial judge's] statements." *Jones*, 292 F.3d, at 511. And, for reasons it did not explain, the Sixth Circuit believed that the legal nature of that question freed it from the constraints of AEDPA and rendered it "not bound" by the decision of the Michigan Supreme Court.

Even if the Sixth Circuit were correct, and the determination of whether a directed verdict had been entered was a pure question of law, its conclusion that no deference was therefore due was directly contrary to the AEDPA and this Court's holding in *Williams*. Even on pure questions of law, a federal habeas court can set aside a state court decision only when that decision is "contrary to" "clearly established Federal law, as determined by the Supreme Court of the United States" or "an unreasonable application of" clearly established law. The Michigan Supreme Court's decision was neither.

The Michigan Supreme Court correctly recognized that, based on this Court's controlling precedent, a directed verdict would bar further proceedings pertaining to guilt or innocence for first-degree murder. *Vincent*, 565 N.W.2d, at 633. In fact, the Michigan Supreme Court specifically noted that the rule in *Smalis* controlled the disposition of Vincent's double jeopardy claim. *Id.*; *see also Smalis*, 476 U.S., at 142 (holding that when a trial court's ruling amounts to an acquittal, jeopardy bars further proceedings). Thus, the Michigan Supreme Court's application of the controlling rule of law cannot be said to "contrary to" this Court's governing precedent. *See Williams*, 529 U.S., at 405-06.

In applying that legal standard to the facts before it, the Michigan Supreme Court held that the statements of the trial judge did not amount to a ruling on the motions for directed verdict.

Vincent, 565 N.W.2d, at 635.[1] That decision would not be binding on the federal habeas court—if, and only if, it were objectively unreasonable. *See Williams*, 529 U.S., at 413 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.").

But the Sixth Circuit did not determine whether the Michigan Supreme Court's decision unreasonably applied *Smalis*'s rule to the facts of Vincent's case. Instead, contrary to the AEDPA, it simply conducted its own *de novo* review.

Although the Sixth Circuit may have disagreed with the Michigan Supreme Court's application of the legal standards, it could not, and did not, find them objectively unreasonable. Indeed, in evaluating Vincent's double jeopardy claim under this Court's proper precedent, the Michigan Supreme Court stated:

> We are aware that how the judge characterizes his statement is not controlling, nor is the form of the so-called ruling controlling, but in this case we find that the judge was correct. *He had not directed a verdict.* Statements couched in the terms 'my impression,' 'I think,' 'in the event that it's not our premeditation planning episode,' and 'it may very well be,' do not resound in finality. To the contrary they are clearly equivocal. We would be hard pressed to call this kind of indecisive pondering a final judgment of acquittal. *Vincent*, 565 N.W.2d, at 635.

---

1. To the extent that determination was based on factual issues, such as the context of the trial judge's statements, and the confusion and uncertainty evidenced therein, those factual issues are entitled to a presumption of correctness in federal court. *See* 28 U.S.C. §2254(e)(1). The Sixth Circuit did not discuss this possibility.

While another court might have come to a different conclusion, to deem these equivocal oral statements from the bench—revisited moments thereafter with the trial judge's agreeing to hear from the prosecution for its arguments on the matter the next morning, *Vincent*, 292 F.3d, at 508—as something less than the entry of a directed verdict is, at the very least, not unreasonable.

Under the plain language of §2254(d)(1), the Sixth Circuit was required to defer to the Michigan Supreme Court's decision and analyze: (1) whether the Michigan Supreme Court applied a rule of law that contradicted this Court's governing precedent; (2) whether the Michigan Supreme Court confronted a set of facts materially indistinguishable from a decision of the Court but nevertheless arrived at a different result; or (3) whether the Michigan Supreme Court's decision was an objectively unreasonable application of clearly established law. *See* 28 U.S.C. §2254(d)(1); *see also Williams*, 529 U.S., at 405-06, 411. The Sixth Circuit engaged in none of this analysis.

The Sixth Circuit's decision fails to accord proper deference to the state court's adjudication. While the Michigan Supreme Court adjudicated Vincent's double jeopardy claim on the merits based on controlling federal law as determined by this Court and rejected his claim, the Sixth Circuit granted habeas relief without any deference to its opinion. This result does not square with principles of finality, comity, and judicial efficiency that underlie Congress's intent in enacting the AEDPA.

Because a state pays a high price[2] when a federal court grants habeas relief without deferring to the state court's adjudication of the same claim, the Court should not let the Sixth Circuit's decision stand. The reasoning employed by the lower court is fundamentally flawed and will undermine Congress's efforts of ensuring that federal courts pay proper respect to a state court's decision. *See Williams*, 529 U.S., at 404 ("It cannot be disputed that Congress viewed §2254(d)(1) as an important means by which its goals for habeas reform would be achieved."). Because the Sixth Circuit's decision violates the express terms of the AEDPA and fundamental principles of federalism, it should be reversed.

CONCLUSION

For these reasons, *Amici* respectfully submit that the judgment of the court of appeals should be reversed.

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2. As the Court stated in *Coleman v. Thompson*, 501 U.S. 722, 738-39 (1991):

> "[M]ost of the price paid for federal review of state prisoner claims is paid by the State. . . . It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction."

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Feb. 24, 2003

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Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

No. 02-524

IN THE

SUPREME COURT OF THE UNITED STATES

JANETTE PRICE,

Petitioner,

— v.—

DUYONN ANDRE VINCENT,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Vincent was twice placed in jeopardy by the action of the trial court in first granting a motion for directed verdict on the issue of first degree murder, and shortly thereafter withdrawing its grant, where both the initial decision and its recall occurred out of the presence of the jury.

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INTEREST OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS[1]

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide–along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives, NACDL files approximately 35 *amicus curiae* briefs a year, including at least ten *amicus curiae* briefs in the United States Supreme Court on a variety of criminal justice issues. *See* NACDL's website at www.nacdl.org.[2]

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

2. The NACDL will not address the first question presented by the Petitioner, concerning the standard of review to be applied to whether the Michigan Supreme Court's determination that the trial court did not render a directed verdict of acquittal was a determination of fact or a conclusion of law under the Anti-Terrorism and Effective Death Penalty Act of 1996..

STATEMENT OF THE CASE

Respondent and two co-defendants were charged with murder and unlawful possession of a firearm in connection with a shooting death. Under Michigan law, the state can charge a defendant with "open murder," and the jury determines the degree of murder. After the prosecution rested its case, the defendants moved jointly for a directed verdict of acquittal on first degree murder, on the ground that the government had not introduced sufficient evidence to meet its burden of proving beyond a reasonable doubt that the defendants acted with premeditation and deliberation. Outside the presence of the jury, the trial judge heard argument from both sides and then stated, "I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay." *Joint Appendix* ("*J.A.*") at 13.

At the end of the hearing, the prosecutor requested an opportunity "to make a brief restatement in terms of the First Degree Murder . . ." when court resumed the next day. The trial judge responded, "Yes, I'll be glad to hear it. Sure. I'm always glad to hear people." *J.A.* at 18. When he made this request, the prosecutor did not ask for reconsideration of the court's grant of the defense motion, nor did the trial judge state on the record that he was reserving judgment or would postpone his decision on the motion until the prosecutor made his "brief restatement." The court's docket entry for that day states, "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER. CT: II FEL. FIREARM STAY THE SAME." *J.A.* at 1. The next day, the prosecutor argued that the evidence to support the first degree murder charge was sufficient. In response to defense counsel's argument that the court had granted the directed verdict motion, preventing further consideration of first degree murder under double

jeopardy, the trial judge stated, "Oh, I granted a motion, but I have not directed a verdict." *J.A.* at 36. Respondent later testified at trial and the jury found him guilty of first degree murder.

SUMMARY OF THE ARGUMENT

The Court enunciated the fundamental protection provided by the Double Jeopardy Clause in *Ball v. United States*, 163 U.S. 662 (1896): "The verdict of acquittal was final, and could not be reviewed, on error *or otherwise*, without putting him twice in jeopardy, and thereby violating the constitution." *Id.* at 671 (emphasis added). The constitutional protection afforded by an acquittal means that a court may not conduct any further proceedings on the acquitted charge regarding the guilt or punishment of the defendant, including the continuation of a trial.

The Court has been consistent in applying the holding of *Ball* regarding the preclusive effect of an acquittal on any further proceedings regarding the underlying charge. *See Sanabria v. United States*, 437 U.S. 54,72-73 (1978) ("finding of fact [of insufficient proof of an element of the charged offense] stands as an absolute bar to any further prosecution for participation in that business."). The double jeopardy protection prohibits further judicial action that threatens the integrity of the acquittal in any procedural form: an appeal, second prosecution on the charge, and continuation of the same proceeding on the acquitted charge. Even if a defendant's trial on other charges–including lesser-included offenses–may continue, the grant of a judgment of acquittal on a charge means that neither the court nor the jury may take any further action that would constitute a second jeopardy.

The trial judge in this case granted the motion for a directed verdict on the first degree murder charge, and the

court's docket entry establishes quite clearly that the Respondent was acquitted of that offense. Therefore, the charge could not be reinstated at a later time, regardless of whether the jury learned of the trial judge's action. This case is controlled by *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), in which the Court held that entry of a demurrer by the trial court was an acquittal and, therefore, "whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Id.* at 145.

The Double Jeopardy Clause applies regardless of whether a judge or jury hears the matter. The Court has never held that the constitutional protection afforded a defendant applies differently depending on the identity of the trier of fact once jeopardy attaches. The Court should adhere to the clear rule it has followed consistently, that an acquittal terminates the proceeding on the charge. Defendants and their counsel must be able to rely on the protection afforded by the Double Jeopardy Clause because the possibility of continuing jeopardy on a charge will affect strategies for presenting an appropriate defense. Most importantly, the defendant's decision whether to waive the protection of the Fifth Amendment privilege against self-incrimination may depend on the charges being prosecuted. The possibility that a defendant could convict himself on a charge that a court initially decided should not go forward because the government had not met its constitutionally-mandated burden of proof flies in the face of the fundamental protection of the Double Jeopardy Clause.

ARGUMENT

I. AN ACQUITTAL TERMINATES ALL FURTHER FACTFINDING PROCEEDINGS AGAINST THE DEFENDANT ON THE ACQUITTED CHARGE, REGARDLESS OF WHETHER THE JURY IS INFORMED OF THE ACQUITTAL OR WHETHER THE TRIAL WILL CONTINUE BEFORE THE SAME JURY.

The Double Jeopardy Clause of the Constitution protects the defendant from being "twice put in jeopardy" for the offense. The Court made clear over a century ago the effect of an acquittal on further proceedings against the defendant: "The verdict of acquittal was final, and could not be reviewed, on error *or otherwise*, without putting him twice in jeopardy, and thereby violating the constitution." *Ball v. United States*, 163 U.S. 662, 671 (1896) (emphasis added). As the Court explained in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), *Ball*'s description of the double jeopardy protection is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence . . . ." *Id.* at 571. The Double Jeopardy Clause provides an absolute protection for a defendant from a subsequent appeal by the government, a second trial on the charges, or a continuation of the initial prosecution, once the trial court enters a judgment that constitutes a decision on the sufficiency of the government's evidence. *See United States v. Scott*, 437 U.S. 82, 88 (1978) ("This Court held [in *Ball*] that the Double Jeopardy Clause precluded further prosecution of the defendant who had been *acquitted* at the original trial . . . ." (emphasis in original)).

The constitutional protection does not depend on whether the trial is before a jury or to the court. Jeopardy

attaches once the jury is sworn in to begin its service, *Downum v. United States*, 372 U.S. 734 (1963), or when the court begins to hear evidence from a witness. *Serfass v. United States*. 420 U.S. 377 (1975). Once jeopardy attaches to a trial, the Court permits a second proceeding only in specific situations involving a mistrial or successful appeal by the defendant of a conviction, neither of which is relevant in this case. The Court has made it clear that, once there is an acquittal, the particular form of the judgment or availability of the jury to continue its deliberations does not affect the application of the double jeopardy protection prohibiting further proceedings. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) ("we recognize that the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.").

In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court prohibited any consideration through a writ of mandamus of an acquittal when the trial court "directed the jury to return verdicts of acquittal as to all the defendants, and a formal judgment of acquittal was subsequently entered." *Id.* at 142. The Court reiterated this position in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). In that case, the trial court had entered a judgment of acquittal for insufficiency of the evidence after dismissing a "hopelessly deadlocked" jury, and the government argued that it could appeal the trial court's ruling because "only a verdict of acquittal formally returned by the jury should absolutely bar further proceedings . . . ." *Id.* at 572. The Court's response to that argument was simple and direct: "*We cannot agree.*" *Id.* (emphasis added).

Petitioner makes much of the fact that the trial judge did not inform the jury that he granted the motion for a directed verdict, so that the original jury could still render a

verdict once the trial judge reversed his position. See *Petitioner's Brief* at 33 ("The present case involves the question whether a directed verdict is an acquittal as soon as an order is granted, or not until a written order is entered or *until the jury is instructed in accordance with its terms.*"); (emphasis added). This argument, however, is similar to the position the Court rejected in *Martin Linen Supply*; namely, that the absence of a formal jury verdict does not affect the determination of whether double jeopardy prohibited any further proceedings. Even if the jury remains available to render a verdict, a trial judge's ruling that the government has not introduced sufficient evidence to prove the crime ends the matter. The role of the jury as the trier of fact does not somehow displace the authority of the trial judge to enter a judgment of acquittal.

The effect of a trial court's decision on the applicability of double jeopardy does not depend on the its characterization of that decision. *See Martin Linen Supply Co.*, 430 U.S. at 571 ("we have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action."). The view expressed by the trial judge in this case–that the grant of the defendants' motion for a directed verdict did not trigger any double jeopardy consequences because the jury had not been informed of the ruling–is irrelevant to this Court's determination of whether the Fifth Amendment prohibits any further proceedings. *But see Petitioner's Brief* at 29 ("It is clear from the record that it was the trial judge's position that the Double Jeopardy Clause did not prevent him from reconsidering the grant of a motion for directed verdict since he had not informed the jury of his ruling.").

In *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), the Court ruled on the characterization of the trial court's decision for double jeopardy purposes when it stated:

> We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as "the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause]," *United States v. Scott*, 437 U.S. 82, 96 (1978) (citation omitted), so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

Id. at 144 n.5. The grant of the motion for a directed verdict in this case constituted an acquittal that terminated all further proceedings, regardless of whether the judge believed the Double Jeopardy Clause applied or the jury continued to sit in judgment on the other charges. The protection afforded by the Double Jeopardy Clause applied, and as stated in *Ball*, that decision "could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution." 163 U.S. at 671.

The Double Jeopardy Clause prohibits any further *proceedings* on a charge once there is an acquittal, not simply a second trial or an appeal. The Court's unanimous decision in *Smalis* is controlling precedent and supports the Sixth Circuit's decision in this case that further proceedings should not have occurred once the trial judge granted the directed verdict motion. *Smalis* held that the Double Jeopardy Clause barred the state's appeal after the trial judge granted a demurrer to the charges:

> The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court v. Lydon*, 466 U.S.

294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." Brief for Respondent 87-88. But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U.S., at 308. Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. *Arizona v. Rumsey*, 467 U.S. 203 (1984). When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into " 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.' " *Martin Linen*, 430 U.S., at 570.

Id. at 145-46.

The United States, in its Brief as *amicus curiae*, advances the argument that double jeopardy does not prohibit further proceedings unless there would be an appeal from a final judgment requiring a second trial, but not the continuation of the original proceeding. *See Brief for the United States* at 13-14 (Respondent's argument "overlooks the

pivotal distinction between reconsideration of an initial ruling by the trial court itself and reversal of the trial court's ruling on *appeal* . . . An appeal necessarily implicates the prohibition against post-acquittal trial proceedings . . . .") (emphasis added). The United States asserts that there was no violation of Respondent's double jeopardy right because the prosecution "seeks only to continue the trial to a verdict rather than to initiate a *new trial* at which it can present a more persuasive case." *Id.* at 20 (emphasis added).

The United States misreads the Court's holdings on the effect of an acquittal when the same jury continues to hear evidence on other charges. While decisions reference the defendant's personal interests in avoiding a second trial,[3] the Double Jeopardy Clause does not prohibit only multiple proceedings before different juries or post-verdict appeals. Simply because a defendant's first trial would continue before the same jury does not affect the constitutional determination of whether there was an acquittal that bars further proceedings on the acquitted charge. As the Court stated in *Sanabria v. United States*, 437 U.S. 54 (1978): "It is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal

3. *See, e.g., Arizona v. Washington*, 434 U.S. 497, 505 (1978) (discussing a "defendant's valued right to have the trial concluded by a particular tribunal"); *United States v. Martin Linen Supply Co.*, 430 U.S. at 570 n.7 ("The absence of a threatened second trial mitigates the possibility of governmental jury shopping and substantially reduces the expense and anxiety borne by the defendant."); *United States v. Wilson*, 420 U.S. 332, 343 (1975) ("When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (*quoting Green v. United States*, 355 U.S. 184, 187-88 (1957)).

or giving it erroneous instructions that resulted in an acquittal." *Id.* at 64 n.18.

Under *Smalis*, the Double Jeopardy Clause forbids any "postacquittal factfinding procedings." The focus urged by the United States on the absence of an appeal or possibility of a second trial in this case misses the point that double jeopardy prohibits all forms of judicial proceedings on the charge after an acquittal. Quite simply, once there is a decision that the government failed to introduce sufficient evidence to convict, the case is over and the prosecution cannot pursue the charge any further. Therefore, the Constitution proscribes any additional proceeding on a charge–whether it be an appeal, second trial, or continuation of the original trial–after an acquittal.

II. THE COURT'S CLEAR DOUBLE JEOPARDY RULE BARS RECONSIDERATION OF A DECISION THAT IS AN ADJUDICATION ON THE SUFFICIENCY OF THE GOVERNMENT'S EVIDENCE.

For over a century, the Court has adhered to the position that an acquittal of a defendant prohibits the government from pursuing the charge any further. *Ball v. United States*, 163 U.S. 662 (1896). The double jeopardy protection applies whether the trier of fact is the court or a jury. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial."). Once jeopardy attaches, any adjudication on the sufficiency of the government's case in favor of the defendant precludes further prosecution of the defendant on the charge. The issue in this case is whether the trial judge's grant of the defendants'

motion at the close of the government's case constitutes an acquittal for double jeopardy purposes. The NACDL submits that the answer is clearly yes, and therefore further consideration of the first degree murder charge was prohibited.

The critical issue in determining whether there has been an acquittal for double jeopardy purposes is whether the trial court reached a determination on the sufficiency of the evidence in favor of the defendant. If the trial court's decision is not on the sufficiency of the government's evidence of guilt, then the timing of that decision does not change the application of the double jeopardy protection. In *United States v. Wilson*, 420 U.S. 332 (1975), and *Serfass v. United States*, 420 U.S. 377 (1975), the Court refused to find that double jeopardy applied to prohibit further proceedings when the rulings at issue were not decisions based on the merits of the government's evidence at trial. *Serfass* involved a decision on a pre-trial motion to dismiss, although granted during trial, and in *Wilson* the appeal was from the grant of a post-verdict motion for acquittal after the jury rendered a guilty verdict. *See Wilson*, 420 U.S. at 352-353 ("when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause."); *Serfass*, 420 U.S. at 391-92 ("Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.").

Thus, the Court is unwilling to invoke double jeopardy for decisions that do not rise to the level of a judgment on the merits of the government's evidence. Once there is such a factual finding on the insufficiency of the government's evidence, however, the acquittal has constitutional significance if "jeopardy has once attached and an accused has been subjected to the risk of conviction." *Serfass*, 420 U.S. at 392. Similarly, in *Wilson*, the Court stated:

> [W]e continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilty after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second, and it would disserve the defendant's legitimate interest in the *finality of a verdict of acquittal*.

420 U.S. at 352 (emphasis added). The Court reaffirmed the critical importance of a court's ruling on the sufficiency of the evidence for double jeopardy purposes in *United States v. Scott*, 437 U.S. 82 (1978), stating that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." *Id.* at 91.

In *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), the Court maintained the unbroken line of decisions that accord an acquittal based on the insufficiency of the government's evidence full effect in stating that "whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." 476 U.S. at 145. Further, the Court rejected the State's argument that it modify its double jeopardy rule to permit the trial judge to continue the *same* proceeding that had been previously stayed pending resolution of the appeal: "What the demurring defendant seeks is a ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt. Our past decisions, which we are

not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause." *Id.* at 144.[4]

This term, in *Sattazahn v. Pennsylvania*, 573 U.S. ___, 123 S.Ct. 732 (2003), the Court reiterated the effect of an acquittal on the permissibility of future proceedings, in the context of a second capital sentencing. The Court held that "the relevant inquiry for double jeopardy purposes was . . . whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence–*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Id.* at 738. This holding is consistent with the Court's precedents establishing a clear rule for application of the Double Jeopardy Clause; namely, once the trier of fact determines that the government has not introduced sufficient

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4. Petitioner asserts that the trial judge's initial decision to grant the directed verdict motion was "erroneous," as if that mitigates the effect of the trial judge's ruling or authorizes a less-strict application of double jeopardy. The Court has been clear, however, that the correctness of the trial court's decision to enter an acquittal based on insufficient evidence after jeopardy attached is irrelevant. In *Fong Foo v. United States*, 369 U.S. 141 (1962), the district judge, upset at "supposed improper conduct" of the federal prosecutor, "directed the jury to return verdicts of acquittal as to all the defendants, and a formal judgment of acquittal was subsequently entered." *Id.* at 142. Although the Court apparently agreed with a statement of the First Circuit "that the acquittal was based upon an egregiously erroneous foundation," it stated that "[n]evertheless, '[t]he verdict was final, and could not be reviewed * * * without putting [the petitioners] twice in jeopardy, and thereby violating the constitution.'" *Id.* (quoting *Ball*, 163 U.S. at 671). In *Sanabria v. United States*, 437 U.S. 54 (1977), the Court stated that "we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id.* at 68-69 (footnote omitted). An incorrect or misguided ruling cannot be reconsidered once the trial court determines that the government has not presented sufficient evidence to prove all the elements of an offense.

evidence on the elements of the offense, there can be no further prosecution of that offense.

The Petitioner and the United States both seek to change the Court's clear acquittal rule by asserting that a trial court should be permitted to reconsider any ruling to correct an error so long as the jury was not informed of the decision and the same jury remains available as the trier of fact. The example provided by Petitioner of a trial court's correction of a ruling that otherwise might have resulted in the invocation of the double jeopardy prohibition is *People v. Vilt*, 113 Ill. App. 832, 833-34 (Ill. Ct. App. 1983), *quoted in Petitioner's Brief* at 39. The trial judge in *Vilt* had the two defendants confused when deciding a motion on the sufficiency of the government's evidence, and immediately corrected the error when the prosecutor pointed it out. This decision does not support the argument that reconsideration at any time is permissible because in *Vilt* the trial court *immediately* corrected its error and did not conduct further proceedings after its initial decision. Unlike the correction of an error, an acquittal is not the result of a judge uttering magical words, but a decision that the government has not met its burden of establishing all the elements of a crime beyond a reasonable doubt. When the trial judge in this case granted the motion for a directed verdict, without stating that the decision was tentative or that the court was reserving its decision, then the court entered a valid order resulting in an acquittal on first degree murder that triggered the protection of the Double Jeopardy Clause.

Petitioner asserts that the "Court's cases simply do not clearly establish that double jeopardy prohibits a state trial judge from correcting the erroneous grant of a motion for directed verdict where the jury was not informed or discharged and not further trial proceedings were conducted between the grant and the court's reconsideration and withdrawal."

Petitioner's Brief at 29. Petitioner asks the Court to alter its longstanding rule by recognizing that "[t]here are at least three conceivable points at which jeopardy could be held to terminate by acquittal in a jury trial. The first is upon utterance of words by a trial judge granting a motion for an order of acquittal. The second is upon the court's instruction to the jury that it is not to consider the charge in question. The third is upon the jury's discharge." *Id.* at 34. In effect, Petitioner would condition the double jeopardy protection on either the court informing the jury of its ruling in favor of the defendant or the jury rendering a final verdict, and nothing less. The Court, however, has never held that a trial court's decision to grant an acquittal is ineffective for the double jeopardy protection to apply until a jury renders a verdict on the merits or is discharged.

The United States argues for a narrower–but no less unsupported–rule that "a court's reconsideration of its own initial decision to grant a motion for acquittal raises no double jeopardy concerns."[5] *Brief for the Unites States* at 13. In support of its position, the United States relies on the principle

5. In a footnote, the United States tries to distinguish *Smalis* on the ground that "[t]he defendant did not argue–and neither this Court's opinion nor any of the state court opinions suggested–that the trial court was barred by the Double Jeopardy Clause from reconsidering its initial decision." *Brief for the United States* at 13 n.5. That issue was not raised in the courts below or in this Court because it was irrelevant. The Court's silence on an issue it could not have considered is hardly persuasive on the scope of the Double Jeopardy Clause. Petitioner also distinguishes *Smalis* on the ground that "[t]he present case involves the question whether a directed verdict is an acquittal as soon as an order is granted, or not until a written order is entered or until the jury is instructed in accordance with its terms." *Petitioner's Brief* at 33. The presence or absence of a written order was irrelevant to the Court's decision in *Smalis*, and because the case was tried to the court there could be no instruction to the jury. *Smalis* concerned whether or not the trial judge's decision was an "acquittal," the identical issue in this case.

that trial courts have the "inherent authority to reconsider and correct their interlocutory rulings," *id.* at 14, and therefore reconsideration "specifically renders the initial ruling non-final and hence inconclusive." *Id.*

Petitioner and the United States assume that a trial court has the inherent authority to avoid the Double Jeopardy Clause by a subsequent announcement that it is reconsidering an earlier decision that the government had not introduced sufficient evidence to convict the defendant. But, there is no principled basis to distinguish between a decision to grant a directed verdict at the conclusion of the government's case, a directed verdict at the close of all the evidence, and a jury verdict of not guilty. Yet, that is precisely what Petitioner and the United States do in arguing that double jeopardy does not apply to a ruling on the sufficiency of the evidence before the jury reaches a decision.

This Court consistently recognizes, however, that a fundamental protection afforded by double jeopardy is the finality of a decision on the merits of the government's evidence. *See Sattazahn v. Pennsylvania*, 573 U.S. ___, 123 S.Ct. 732, 744 n.2 (2003) ("The Court has many times said that the Double Jeopardy Clause protects the integrity of 'final judgments.'"); *Scott*, 437 U.S. at 92 (noting that "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment" (citing *Crist v. Bretz*, 437 U.S. 28, 33 (1978)); *Wilson*, 420 U.S. at 352 (Granting the government "broad appeal rights" after an acquittal "would disserve the defendant's legitimate interest in the finality of a verdict of acquittal."); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 *U. Ill. L. Rev.* 827, 852 ("Thus, an acquittal always bars further proceedings. This is the only absolute rule of traditional double jeopardy analysis, and the Supreme Court has clung tenaciously to it through a series of cases that invited exceptions."). A trial court's

inherent authority to reconsider its rulings generally cannot alter the constitutional protection given a defendant when there is an acquittal on the merits.

Adopting the position advanced by Petitioner and the United States would denigrate the protection afforded by the Fifth Amendment. For example, the argument advanced by the Petitioner and the United States would permit a judge to reconsider a grant of an acquittal at any time before the jury rendered a final verdict. Trials that take weeks or even months are not uncommon, so a trial judge could grant a defendant's motion that there was insufficient evidence to prove a charge, and then decide much later that the earlier decision was mistaken. While the Petitioner and the United States criticize Respondent's argument because the prohibition on further proceedings under double jeopardy is immediate, their approach would permit a judge to reconsider a ruling at any time, without limitation. The Double Jeopardy Clause does not afford the judiciary the authority to grant and then remove the constitutional protection just because a jury trial has not ended with a final judgment.

The pernicious effect of recognizing an unlimited right for trial judges to reconsider an acquittal–so long as the jury remains available to decide the case–is illustrated by the dilemma defense counsel would face. If a judge granted a defense motion for an acquittal on a charge at the end of the government's case because of insufficient evidence, counsel might well recommend that the client testify regarding the remaining counts because the threat of a more severe punishment has been removed. After hearing the additional evidence, including the defendant's testimony and the government's rebuttal case, could the trial court decide to "reconsider" the earlier decision and reinstate the previously dismissed counts? Surely the Double Jeopardy Clause bars reconsideration based on new evidence.

In *Burks v. United States*, 437 U.S. 1 (1978), the Court stated, "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11. Permitting a trial court to reconsider an acquittal when that could involve consideration of additional evidence, provided by either the defendant or the government, clearly violates the double jeopardy protection described in *Burks* as "central to the object of the prohibition against successive trials." *Id.* Regardless of the source of the evidence, it would be further factfinding after an acquittal in violation of the Double Jeopardy Clause.

Such a possibility would be entirely possible under the analysis advanced by the Petitioner and the United States, because it would permit reconsideration of an acquittal by the trial judge at any time prior to the entry of a final judgment by the jury. The United States asserts that the Respondent and the courts below took a position that was "highly indeterminate and defies principled application," *Brief for the United States* at 24. But, it is Petitioner and the United states that seek a "reconsideration exception" to the Double Jeopardy Clause that undermines the consistently enforced principle that a decision on the sufficiency of the government's evidence in favor of the defendant prohibits any further proceedings on the charge.

Defense counsel make strategic decisions throughout trial regarding the witnesses to call, the evidence to offer for admission, and the type of defense to put forth to the trier of fact. The presence of certain charges, including greater- or lesser-included offenses, with their different levels of intent, will influence the arguments presented to the jury, the types of cross-examination to pursue, and the decision whether to pursue certain issues on direct examination of a witness who may be subject to impeachment. In this case, the original

decision on the motion for a directed verdict meant that first degree murder, which required proof of premeditation and deliberation, was no longer available for a conviction.

If a trial judge could reconsider an acquittal at a later point in the trial, then defense counsel will never be certain whether a strategy decision might wind up convicting the client, perhaps with the client's own testimony. The most important decision defendants and their counsel make is whether to waive the Fifth Amendment privilege against self-incrimination and testify.[6] Any potential ruling that could adversely affect a defendant's Fifth Amendment privilege should be viewed with great caution.

As the Court has recognized on numerous occasions, one of the "basic functions" of the privilege against self-incrimination "is to protect innocent men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (quoting *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551, 557-58 (1956)). Similarly, the Court prohibits any comment on a defendant's decision not to testify because it would be "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965). *Griffin* described the problem that any witness–and especially

6. The Court stated in *Rock v. Arkansas*, 483 U.S. 44 (1987), that it "has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." *Id.* at 52 n.10. The ethics rules of the legal profession give the defendant in a criminal trial the final say in whether to testify, subject, of course, to the requirement that the testimony be truthful. *See ABA Model Rule of Professional Conduct* 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer . . . whether the client will testify.").

the defendant in a criminal prosecution–faces when called to testify:

> It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.

Id. at 613.

The "reconsideration exception" to the double jeopardy protection offered by Petitioner and the United States compounds the problem facing a defendant during trial by creating the possibility that one's own testimony could result in a conviction when that testimony should not have been considered by the trier of fact on the charge. Both the defendant and defense counsel need the certainty provided by the Court's consistent application of the double jeopardy principle that an acquittal is final.

Another shortcoming in the analysis of the Petitioner and the United States is that it conditions the double jeopardy protection on whether the case is tried to the court or before a jury. The argument of Petitioner and the United States appears to be that the Court should adopt an open-ended rule in jury trials permitting reconsideration of an acquittal to avoid the effect of the Double Jeopardy Clause. The Court has never distinguished the effect of an acquittal under double jeopardy based on which trier of fact heard the case. *See Smalis*, 476

U.S. at 145 ("Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause."). Moreover, the trial court has the authority to enter an acquittal even if a jury is empaneled to decide the case, and a dismissal of a charge based on the merits invokes the protection of double jeopardy just the same as a jury verdict.[7]

In *United States v. Martin Linen Supply Co.*, 430 U.S. at 564 (1977), the Court rejected the Government's argument that "only a verdict of acquittal formally returned by the jury should absolutely bar further proceedings . . . ." *Id.* at 572. The Court noted that while a trial judge cannot interfere with the jury's judgment by directing a verdict in favor of the government, "[s]uch a limitation on the role of a trial judge . . . has never inhibited his ruling in favor of a criminal defendant." *Id.* The presence of a jury that could find the defendant guilty does not make it permissible for a trial judge to reconsider a decision on the insufficiency of the government's evidence that otherwise would prohibit further proceedings on the charge.

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7. The Court recognized in *Hudson v. Louisiana*, 450 U.S. 40 (1981), and *Tibbs v. Florida*, 457 U.S. 31 (1982), that a court's "disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal." *Id.* at 41. In that situation, the court is sitting as a "13th Juror" in deciding whether the weight of the evidence supports the verdict, but not whether there was sufficient evidence from which any rational juror could find the defendant guilty beyond a reasonable doubt. *See Hudson*, 450 U.S. at 44-45 n.5 (double jeopardy "precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so . . . By definition, a new trial ordered by a trial judge acting as a '13th juror' is not such a case."). The trial judge in this case granted the defendants' motion for a directed verdict due to the insufficiency of the government's evidence of an element of the crime, and therefore the Double Jeopardy Clause applies to the decision.

The Petitioner and the United States stress how difficult it will be for appellate courts to determine exactly what a trial court decided if judges are not given unfettered discretion to reconsider a ruling at any point prior to the jury's verdict. *See, e.g., Brief for the United States* at 24-25 ("Distinguishing a situation involving the grant of an acquittal followed promptly by reconsideration from one involving equivocation all along would prove especially difficult because "[i]ndividual trial judges' styles of ruling vary. Many judge will think out loud along the way to reaching the final result." (quoting *State v. Collins*, 771 P.2d 350, 353 (Wash. 1989)). But a judge ruminating is quite different from a judge granting a defendant's motion for a directed verdict due to the insufficiency of the government's evidence. This Court has been called on a number of times to determine whether or not a decision of a trial court was–or was not–an acquittal on the merits. Indeed, the entire line of cases from *Fong Foo* through *Sattazahn* required the Court to determine if a decision amounted to an acquittal that invoked the protection of the Double Jeopardy Clause, including careful review of the trial record. As the Court noted in *Smalis*, a lower court's characterization of its decision "is not binding on us," 476 U.S. at 144 n.5, and determining the exact nature of a trial court's ruling is a common exercise for appellate courts.

CONCLUSION

The Double Jeopardy Clause is absolute once an acquittal occurs, despite any perceived unfairness to the government from the prohibition on further proceedings in a potentially meritorious case. The Court was willing to enforce the constitutional protection in cases like *Fong Foo* and *Sanabria*, despite the trial court's "egregiously erroneous" analysis or "erroneous evidentiary ruling," because the Double Jeopardy Clause does not permit any further consideration of an issue related to a defendant's guilt. The drastic effect of a

finding on the sufficiency of the government's evidene, even when questioned by the judge who made the initial decision, is not the result of new rule offered by the Respondent or the lower courts in this case, but the effect of the Court's clear understanding of the constitutional protection since *Ball*: "The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution." 163 U.S. 662, 671 (1896); *see Sanabria*, 437 U.S. at 72-73 (A "finding of fact stands as an *absolute bar* to any further prosecution for participation in that business.") (emphasis added).

For the reasons set forth above, the NACDL respectfully requests that the Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

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Dated: March 25, 2003